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No. 1376

IN THE

Supreme Court of the United States

October Term, 1967.

DAVID MILGRAM AND HIS ASSOCIATES,
Petitioners,

v.

OLD COLONY TRUST COMPANY, UNITED VENTURES, INC., GABRIEL POWERS, PENROSE INDUSTRIES CORPORATION, WILLIAM PENN BROADCASTING COMPANY, REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, WILLIAM H. SYLK, HARRY S. SYLK, JONAS SENTER, SELMA KATZ, SAMUEL ROSENBLUM, SIMON ROSENBLUM, LEON J. OBERMAYER, Conservator, and WALTER E. HELLER & CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID BERGER,
HERBERT B. NEWBERG,
HOWARD L. SCHAMBELAN,
COHEN, SHAPIRO, BERGER, POLISHER AND COHEN,
22nd Floor, P.S.F.S. Bldg.,
Philadelphia, Pa. 19107
Counsel for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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DAVID MILGRAM AND HIS ASSOCIATES,
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v.

OLD COLONY TRUST COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, David Milgram and his Associates, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in the above entitled case filed January 9, 1968.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Third Circuit, filed January 9, 1968, is reported at 387 F. 2d 939. It is appended to this Petition as Appendix A.

JURISDICTION.

The Opinion (Appendix A) and Judgment (Appendix B) of the United States Court of Appeals for the Third Circuit, filed on January 9, 1968, affirmed the Order of the United States District Court for the Eastern District of Pennsylvania.

On April 5, 1968, Honorable William J. Brennan, Jr. signed an Order extending time to file petition for Writ of Certiorari. This Order extended the time to file this petition to and including April 29, 1968.

The jurisdiction of this Court is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254, which provides for appeal from cases in the courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED.

1. Is there a need for this Court, at this time, to set guidelines for the interpretation of Federal Rule of Civil Procedure 24, as recently amended, and further to clarify the broad principles set forth in its decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), in view of the fact that the District Courts and Courts of Appeals have taken different and varying approaches to the interpretation of this Rule which vitally affects thousands of litigants every year.

2. Are petitioners, seeking to protect their interests in specific property, entitled to intervene in an action in which judicial approval is sought by a senior lienholder for the proposed sale of collateral, which sale would leave little funds for junior lienholders and none for general creditors, when, at the invitation of the court, petitioners, prior to

trial, made a firm offer to purchase the collateral from the insolvent debtor for a sum substantially higher than the offer for which judicial approval was being sought?

(Answered in the negative by the District Court for the Eastern District of Pennsylvania, which was affirmed on appeal by the United States Court of Appeals for the Third Circuit.)

3. Is the decision of the Third Circuit in conflict with the decision of this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), and in *S. E. C. v. U. S. Realty and Improvement Company*, 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940), and with decisions in the Fifth Circuit and the District of Columbia Circuit, which have held that F. R. C. P. 24 is to be liberally construed to permit intervention, if, as a practical matter, the intervenor-applicant will be prejudiced by being forced to stand by and await the outcome of the case?

4. In the alternative, did the District Court, in denying petitioners' motion to intervene, abuse its discretion by failing to consider whether the granting of permissive intervention to petitioners, whose claims raised common questions of fact and law, would unduly delay or prejudice the adjudication of the rights of the original parties?

(Not answered by the Court of Appeals.)

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

FEDERAL RULES OF CIVIL PROCEDURE 24(a), (b) as amended:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. As amended Dec. 27, 1946, eff. March 19, 1948.

STATEMENT OF THE CASE.

This case involves the proposed sale of pledged collateral, stock and debentures of William Penn Broadcasting Company [hereinafter referred to as "WPEN"], by pledgees following a default by the pledgor. A proposed agreement to purchase the collateral was entered into between Martin W. Field [hereinafter referred to as "Field"], as purchaser, and the pledgees and their trustee, plaintiffs below, on May 26, 1967.

Although not required by law, the parties to the proposed Field agreement made that agreement subject to the approval of the court. On June 1, 1967, the pledgees and the trustees filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory judgment that the sale was commercially reasonable and other equitable relief (Complaint, Petitioners' Appendix in the Court of Appeals [hereinafter referred to as "C. A."], pp. 4a-15a).

Counsel for respondents conceded at a preliminary injunction hearing, on June 7, 1967, that a better offer for the stock would be relevant to the District Court's decision on whether or not the Field agreement was commercially reasonable, and that respondents had no desire to foreclose the pledgors from selling the stock at a better price, if such was obtainable (Tr., June 7, 1967, pp. 28-29; C. A., pp. 18a-19a).

Petitioners, on June 7, 1967, made a better, firm offer for the WPEN stock. At the hearing of June 7, 1967, the court recognized the right of counsel for petitioners to address the court directly, rather than through counsel for the pledgors, William H. and Harry S. Sylk, and permitted petitioners' counsel to participate fully in the preliminary hearing (Transcript, June 7, 1967, pp. 47, 67, 77; C. A., pp.

20a, 24a, 25a). The court was orally advised by petitioners' counsel that petitioners' offer was firm and that appellants were prepared to pay $6,000,000 for the WPEN stock and debentures at that moment (Tr., June 7, 1967, pp. 49-50; C. A., pp. 22a-23a).

Counsel for the court-appointed-conservator for the benefit of general unsecured creditors, and one of the named defendants in the original action, stated, at the hearing of June 7, that it would be unthinkable for the pledgees to prevent a sale which might benefit general unsecured creditors and thus preclude any recovery by those creditors. Counsel for plaintiffs-respondents agreed that his clients had a fiduciary duty to consider unsecured creditors (Tr., June 7, 1967, pp. 79, 88; C. A. pp. 26a, 28a).

At the conclusion of the hearing on June 7, 1967, the District Court set a further hearing for June 20, 1967, and stated that at that time defendants might produce any firm offers which they contended were more beneficial than the Field offer. Memorandum Sur Motion for Preliminary Injunction, of June 8, 1967 (Appendix C).

At the next hearing, actually held on June 21, 1967, petitioners presented to the court a written agreement, signed by petitioner, David Milgram, for the purchase of the WPEN stock and debentures for $6,000,000, and the court accepted the check of petitioner, David Milgram, for $100,000 as down payment on this firm offer (Tr., June 21, 1967, pp. 156-158, 165-167; C. A., pp. 39a-41a, 44a-46a).

Petitioners' purchase price is almost $1,000,000 more than that offered by Field (Tr., June 7, 1967, pp. 47-48; C. A., pp. 20a-21a; June 21, 1967, p. 157; C. A., p. 40a).

At the hearing on June 21, the Court stated that now that petitioners had made "a definite offer, I assume that you would apply to intervene." (Tr., June 21, 1967, pp. 163-164; C. A., pp. 42a-43a).

Counsel for respondents objected to intervention by petitioners or others submitting firm offers, on the ground that such intervention would be tantamount to the holding of a judicial sale, although he had no objection to these parties being heard and presenting evidence (Tr., June 21, 1967, pp. 173-174; C. A., pp. 50a-51a). However, he advised the court that the additional time interval in which firm offers had been allowed to be made had not prejudiced his clients' position (Tr., June 21, 1967, p. 179; C. A., p. 56a).

The original defendants-pledgors in this case requested that the Court disapprove the Field offer, and make a public offer of and invite open bidding for the WPEN stock. Pledgors have indeed stated that their interests in the method of trial and the outcome of the lawsuit differ from and are opposed to petitioners' interests (Tr., June 28, 1967, pp. 696-701; C. A., pp. 98a-103a).

On June 26, 1967, petitioners formally filed their motion for intervention. The accompanying Complaint requested that the Court enter an order declaring that petitioners' firm offer be accepted by respondents, Old Colony Trust Company, United Ventures, Inc., and Gabriel Powers, and that the Field offer be rejected (Complaint of Intervenors, C. A., p. 66a).

On July 10, 1967, the District Court denied petitioners' motion to intervene, without prejudice to a renewal of their motion after decision on the enforceability and commercial reasonableness of the Field agreement. Order Sur Motion of David Milgram and His Associates (Appendix D).

On August 4, 1967, petitioners filed, with the United States Court of Appeals for the Third Circuit, their Notice of Appeal from the Order denying intervention (C. A., p. 74a).

On August 28, 1967, the District Court entered its Memorandum Sur Notice of Appeal filed by Milgram Associates, by which the District Court suspended trial pend-

ing appeal (Appendix E), which order was amended on August 29, 1967 (Appendix F).

On September 14, 1967, the Court of Appeals ordered the record remanded to the District Court, and denied plaintiffs-respondents' Motion filed on August 29, 1967, for Peremptory Dismissal of the Appeal (Appendix G). On January 9, 1968, the Judgment of the Court of Appeals (Appendix B) affirmed the Order of the District Court of July 10, 1967, which denied petitioners' Motion to Intervene. Petitioners seek review of this decision and judgment.

On January 25, 1968, following the trial in which petitioners were not able to participate as intervenors, the District Court entered an order approving the sale of the pledged collateral, WPEN stock and debentures, to Martin W. Field and declared that the sale was commercially reasonable. Opinion Sur Pleadings and Proof Under Count II of the Complaint, and Order (Appendix H).

BASIS FOR FEDERAL JURISDICTION.

This was an action for declaratory judgment brought pursuant to the act of June 25, 1948, c. 646, 62 Stat. 964, as amended, 28 U. S. C. Section 2201. Jurisdiction was founded upon diversity of citizenship. Act of June 25, 1948, c. 646, 62 Stat. 930, as amended, 28 U. S. C. Section 1332.

ARGUMENT.

This case presents important questions under Federal Rule of Civil Procedure 24, as amended.

Since the amendment of the Rule in 1966, the District Courts and Courts of Appeals have taken different and varying approaches to its interpretation. The question of intervention arises in thousands of cases in the District Courts, and vitally affects thousands of litigants. Further guidance from this Court is needed at this time in order to clarify the broad principles set forth in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967).

Petitioners, by the denial of their Motion to Intervene, which was not disturbed by the United States Court of Appeals for the Third Circuit, have been not only impaired and impeded, but have been effectively precluded from protecting an interest relating to the very property which was the subject of the original action. They have been forced to stand by idly and await the outcome of a dispute, barred from contributing to the resolution of the dispute—a dispute *in* which their interest was substantial and *to* which their interest was directly germane.

The denial of an application to intervene is appealable. *Philadelphia Electric Company v. Westinghouse Electric Corp.*, 308 F. 2d 856 (3rd Cir. 1962).

There is no question that petitioners' motion was timely. Their application was filed on June 26, 1967, less than one month after the filing of the original complaint on June 1, 1967. Trial did not begin until August 23, 1967. Intervention has been permitted when filing of the application has been made long after the filing of the original complaint. *Kozac v. Wells*, 278 F. 2d 104 (8th Cir. 1960)

(one year); *State Wholesale Grocers v. Great Atlantic & Pacific Tea Company*, 24 F. R. D. 510 (N. D. Ill. 1959) (three and one-half years).

Moreover, petitioners cannot be said to be adequately represented in this lawsuit if there is a conflict of interest between themselves and the party supposed to represent their interest, or if parties who might be said to represent their interest seek a decree differing from that sought by petitioners. *Atlantic Refining Co. v. Standard Oil Company*, 304 F. 2d 387 (D. C. Cir. 1962). Plaintiffs-respondents request approval of the Martin W. Field offer. Original defendants-pledgors request that the court disapprove the Martin W. Field offer and make a public offering of and allow open bidding for the stock. Petitioners seek specific approval of the Milgram Agreement. All other parties to this lawsuit oppose the consummation of that agreement. Since petitioners were not a party to the lawsuit, they were and are not represented at all.

The opinion of the Court of Appeals (Appendix A) did not discuss appealability, timeliness, nor adequacy of representation. Rather, the Court of Appeals decided that petitioners lacked such an interest which would entitle them to intervene under F. R. C. P. 24. Petitioners request this Court to decide whether petitioners have such an interest that falls under the protection of F. R. C. P. 24.

Petitioners have an interest in the collateral, which property is the subject of the instant action. Petitioners are not mere potential bidders for the WPEN stock but have made a firm offer to purchase the stock, the offer having been made at the invitation of the court. Memorandum Sur Motion for Preliminary Injunction of June 8, 1967 (Appendix C). Petitioners' check in the sum of $100,000 remains in the custody of the District Court.

The *Uniform Commercial Code* permits a secured party to dispose of collateral without prior judicial approval, if the disposition is commercially reasonable. U. C. C. Section 9-504(3). The *Code* also impliedly permits a secured creditor to obtain prior judicial approval of the sale. See U. C. C. Section 9-507(2) and comments thereto. If obtained, such approval operates to conclusively establish compliance with the requirements of U. C. C. Section 9-504 and to foreclose any challenge to the disposition by the debtor or junior lienors.

It has not been judically determined, prior to the instant case, what is the proper scope of inquiry once judicial approval is sought and a higher firm offer is submitted pursuant to court invitation. However, the policy considerations underlying similar cases support the proposition that once the jurisdiction of a court is requested for approval of a sale, the court must consider the best interest of all parties to the lawsuit. *Binenstock Trust,* 410 Pa. 425, 190 A. 2d 288 (1963). Petitioners contend that the court has the power to grant approval to and order the consummation of a higher offer in order to further the basic objective of Article 9 of The Uniform Commercial Code, which is to permit great latitude in the disposition of collateral following default in order to maximize the amount to be realized. 1 Coogan, Hogan and Vogts, *Secured Transactions Under the Uniform Commercial Code,* Section 8.01 (1966). Petitioners further contend that they have the right to intervene, to protect and advance their interest in the acceptance of their higher offer.

However, even if it is decided that a decision between two competing offers is not properly before the District Court, petitioners' interest in the collateral is unchanged. If petitioners' offer is to be utilized by the District Court only for the purpose of evidence regarding the commercial reasonableness of the Field agreement, petitioners suffer

greater risk that their interest in the collateral will be unprotected unless intervention were granted. Indeed, if the decision of the District Court, approving the Field agreement (Appendix H), is permitted to stand, petitioners will have been effectively precluded from protecting their interest in the WPEN stock and debentures. Moreover, petitioners, who are not parties, are precluded from taking an appeal from this decision on the merits. See *Wolpe v. Poretsky,* 144 F. 2d 505, 508 (D. C. Cir. 1944). Petitioners should have been granted the right of parties to protect their interest, to gain judicial approval of their offer, or at the least, to challenge the commercial reasonableness of the Field offer, by interpreting and proving the substantially greater value of their own firm offer.

This Court, contrary to the Third Circuit, has recognized that new Rule 24 has in effect codified prior "practical approach" cases and approved them. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Company,* 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed 2d 814, 816, n. 3 (1967), in which this Court cites with approval the statement of the Advisory Committee on the 1966 Revisions to the Federal Rules that "this [case law] development was quite natural, for Rule 24(a)(3) was unduly restricted." The Third Circuit has, in this case, repudiated this case law development. Further, the decision of the Third Circuit here is in direct conflict with the decision of the Fifth Circuit in *Atlantis Development Corporation Ltd. v. U. S.,* 379 F. 2d 818 (5th Cir. 1967), which contains a careful and cogent discussion of the scope of new Rule 24(a). The Court in that case pointed out that the new rule goes even further than an codification of the "practical approach cases". Reversing a denial of intervention as of right, the Court held that, as *amicus curiae,* appellant would not be able to properly protect its interest. Atlantis Development Corporation sought to intervene to protect its interest in tidal reefs, the ownership

of which the United States sought to have judicially determined in a suit against another party. "Failure to allow Atlantis opportunity to advance its theories both of law and fact on the trial (and appeal)," was held to be inconsistent with new Rule 24. Ibid. at 828-829. The Court stated that its decision ". . . is, to be sure, a determination by us that in the new language of 24(a)(2) *stare decisis* may now—unlike the former days under 24(a)(2)—supply the practical disadvantage which warrants intervention of right . . .," and that F. R. C. P. 24(a)(2) is to be read to grant to a party the "right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed . . . ." *Ibid.* at 829.

The decision of the Third Circuit is also in conflict with the recent decision of the District of Columbia Circuit in *Nuesse v. Camp*, 11 F. R. Serv. 2d 24a.2, Case 3 (D. C. Cir. 1967). In that case, the Court of Appeals reversed the decision of the District Court denying the right of the Commissioner of Banks of the State of Wisconsin to intervene in a suit brought by a state bank against the United States Comptroller of the Currency for a declaratory judgment that the granting to a competing bank of authority to open a branch bank was unauthorized. The Court stated, in part:

> "We know from the recent amendments to the civil Rules that in the intervention area *the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.* Compare amended Rule 19 ('Joinder of Persons Needed for Just Adjudication'), and Rule 23 ('Class Actions'), and the Advisory Committee Notes, 39 F. R. D. 88-94, 95-107. See also Atlantis Development Corp. v. United States, 379 F. 2d 818, 824 (5th Cir. 1967)." *Ibid.* at p. 840 (Emphasis supplied).

The District of Columbia Circuit, following the lead of the policy set forth in *Cascade*, went on to state:

> "*The Rule* [24 as amended] *now specifies only that the 'disposition of the action may as a practical matter impair or impede his ability to protect' the applicant's interest. This alteration is obviously designed to liberalize the right to intervene in federal actions. Interestingly, an earlier draft would have required that the judgment 'substantially' impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment.* See Cohn, The New Federal Rules of Civil Procedure, 54 Geo. LJ 1204, 1232 (1966). We think that under this new test stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right. We join, therefore, in the analysis recently presented by Judge Brown in Atlantis Development Corp. v. United States, supra, 379 F. 2d at 826-829." *Nuesse v. Camp, supra* at p. 841. (Emphasis supplied.)

The "practical approach" cases under old Rule 24 granted intervention as of right when the judgment in the action "might result in the property being placed beyond the petitioners' reach," and when intervention was necessary for the "purpose of protecting a claimant of specific property which may be distributed as a result of a judgment in the action." *International Mortgage and Investment Corp. v. Von Clemm*, 301 F. 2d 857, 861, 865 (2nd Cir. 1962). These cases also stand for the proposition that a practical approach to Rule 24 must permit intervention as of right if the denial of intervention would preclude any effective remedy, *Atlantic Refining Co. v. Standard Oil Co.*, 304 F. 2d 387, 394 (D. C. Cir. 1962), and when intervention is necessary to avoid a multiplicity of suits and to settle all related controversies in one action, *Kozak v. Wells*, 278 F. 2d 104,

112 (8th Cir. 1960). See also *Ford Motor Co. v. Bisanz Brothers, Inc.*, 249 F. 2d 22 (8th Cir. 1957).

All of the factors which these courts considered controlling in deciding the issue of intervention, and which new Rule 24 has in effect codified and enlarged, are present in the instant case: the decree sought by respondents will place the WPEN stock beyond petitioners' reach; the WPEN stock will be distributed as a result of the decree sought by respondents; the granting of the decree sought by respondents will preclude petitioners from any effective remedy and may establish precedents contrary to petitioners' interests; the denial of intervention will amount to a failure to settle all related controversies in one action.

The District Court itself stated that, if petitioners were successful in pursuing their right to intervene, the trial proceedings would be a nullity (Tr., June 28, 1967, pp. 631, 639, 688-89; C. A., pp. 87a, 90a, 96a-97a). The granting of appellants' motion initially would have precluded the risk of such waste of judicial energy. In *Atlantis Development Corp. Ltd. v. U. S.*, 379 F. 2d 818, 824 (5th Cir. 1967), the Court stated:

> ". . . There are competing interests at work in this area. On the one hand, there is the private suitor's interests in having his own lawsuit subject to no one else's direction or meddling. *On the other hand, however, is the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process.* (Emphasis supplied.)

This case raises important questions as to the nature of the interest and the persons protected by Federal Rule

of Civil Procedure 24, and the proper tests to be applied under Federal Rule of Civil Procedure 24. There is a conflict between the Courts of Appeals in their approaches to F. R. C. P. 24, as amended. The Fifth Circuit, in *Atlantis Development Corp. Ltd. v. U. S., supra,* and the District of Columbia Circuit, in *Nuesse v. Camp, supra,* have taken a liberal approach to the Rule, following the lead of this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra.* The Third Circuit, however, by its opinion in this case, has indicated a refusal to take such a practical approach to F. R. C. P. 24.

In the alternative, if petitioners are considered not to have had a right to intervene, petitioners should have been permitted to intervene under F. R. C. P. 24(b), and the denial of such intervention was an abuse of discretion on the part of the District Court.

In this case, some of petitioners' defenses are common to the defense of respondents-pledgors that the Martin W. Field offer is not commercially reasonable and that it is inferior to another pending offer.

> "Had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case . . . [Applicants] have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown." *Wolpe v. Poretsky,* 144 F. 2d 505, 508 (D. C. Cir. 1944).

There was no claim or showing that the protection by petitioners of their vital interest in the disposition of the WPEN stock, by their presence in the lawsuit, would in any way prejudice the orderly conduct of the proceedings. On the contrary, petitioners' counsel had at one point fully

participated in the proceedings in this action without objection. Even if petitioners' interest is held not to be that legal interest protected by F. R. C. P. 24(a)(2), it is submitted that it was a gross abuse of discretion to refuse petitioners the opportunity to take the steps necessary to preserve their claim to property in which they had an undeniable interest from a commercial point of view.

F. R. C. P. 24(b) provides, in mandatory language, that the Court "*shall* consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (Emphasis supplied). The District Court did not enter into such consideration. The Court of Appeals found no fault with this omission of the District Court, and stated: "[I]f they [petitioners] *lack such an interest* [relating to the property or transaction], they are not entitled to intervene for that purpose *under either provision* of the intervention rule." *Old Colony Trust Co. v. Penrose Industries Corp., David Milgram and His Associates, Appellants,* 387 F. 2d 939, 941 (3rd Cir. 1968). (Appendix A, p. A-3). (Emphasis supplied.)*

The Third Circuit, by reading the "interest" requirement into Rule 24(b), is in direct conflict with the statement of this Court in *S. E. C. v. United States Realty and Improvement Company,* 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940), which, in construing the prior rule regarding permissive intervention, identical to the present rule, stated that

> This provision plainly disposes with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Ibid.,* 310 U. S. at 459, 84 L. Ed. at 1306.

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* Petitioners argued below that, should intervention under F. R. C. P. 24(a) be denied, alternatively, intervention under F. R. C. P. 24(b) should be granted. The Court on its own motion must consider intervention under F. R. C. P. 24(b), should it deny relief under F. R. C. P. 24(a). See *Wolpe v. Poretsky,* 144 F. 2d 505, 508 (D. C. Cir. 1944).

Moreover, the decision of the Third Circuit on the issue of permissive intervention is squarely in conflict, on that point, with the decision of the District of Columbia Circuit in *Nuesse v. Camp, supra*:

> "We think the District Court should have granted the alternative motion seeking permissive intervention under Rule 24(b). While reversal of the denial of permissive intervention is not often wararnted, there is undoubted jurisdiction to enter such an order where the *District Court has not followed the appropriate standard or approach in exercising its discretion.* See Textile Workers Union v. Allendale Co., supra, 96 U. S. App. D. C. at 405-06, 226 F. 2d 769-70.
>
> *Rule 24(b), not amended in 1966, provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact.* In the present case the legal issues are the same. Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention. In Professor Moore's phrase, quoted with approval in Allendale, intervention has been allowed in situations where 'the existence of any nominate "claim" or "defense" is difficult to find.' *While permissive intervention may be denied in order to avoid the likelihood of undue delay, here the District Court's denial of intervention was not put on that ground; it is not seriously argued by appellees and the factual situation does not support it.*" *Ibid.*, 11 F. R. Serv. 2d at p. 844. (Emphasis supplied.)

The District of Columbia Circuit makes clear that the appropriate standard and proper ground for denying permissive intervention is the likelihood of undue delay.

The District Court for the Eastern District of Pennsylvania, in the instant case, gave no thought to "undue

delay" other than to set forth the oft-quoted statement that "additional parties always take additional time". Order Sur Motion of David Milgram and His Associates (Appendix D, p. A-13). Reliance upon this identical quotation, without more, by the District Court for the District of Columbia, was held to be reversible error by the District of Columbia Circuit in *Nuesse v. Camp, supra,* 11 F. R. Serv. 2d at p. 844, n. 13. While it is unarguable that additional parties take additional time, it is submitted that it is an abuse of discretion to fail to consider whether a particular party, whose claim or defense has questions of law or fact in common with the main action, will cause *undue* delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, for the reasons stated above, petitioners strongly urge that this Court grant review on writ of certiorari of the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

DAVID BERGER,
HERBERT B. NEWBERG,
HOWARD L. SCHAMBELAN,
COHEN, SHAPIRO, BERGER, POLISHER AND COHEN,
Counsel for Petitioners.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16819

OLD COLONY TRUST CO., ET AL.

v.

PENROSE INDUSTRIES CORPORATION, ET AL.
DAVID MILGRAM AND HIS ASSOCIATES,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 3, 1967

Before McLAUGHLIN, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 9, 1968)

SEITZ, *Circuit Judge.*

This is an appeal from an order of the district court denying appellants' motion to intervene. We pass any question of appealability or mootness.

On June 1, 1967, plaintiffs filed in the district court an action by which, insofar as is now pertinent, they sought a declaratory judgment that their proposed sale to one Martin W. Field ("Field"), subject to court approval, of certain pledged collateral held by them was "commercially

reasonable'' under Section 9-507(2) of the Commercial Code of Pennsylvania. The collateral consisted of all the stock of Wm. Penn Broadcasting Company (''WPEN'') and a debenture issued by it. Jurisdiction was based on the diversity statute and is not challenged. The defendants consisted of the pledgors of the property in question as well as various alleged secured and unsecured creditors of Penrose Industries Corporation, whose indebtedness to plaintiffs was secured by the collateral involved. WPEN was also a defendant.

On June 26, 1967, the appellants filed a motion to intervene as plaintiffs. This followed an earlier tender by them to the district court of a written offer to purchase part of the collateral involved, viz., the WPEN stock, subject to debentures, for an amount which their counsel claimed was substantially above the price provided in the plaintiffs' contract with Field. A proposed complaint was attached to the motion. It prayed that the court declare that the appellants' offer be accepted by plaintiffs and that the Field offer be rejected.

By order dated July 10, 1967, the district court denied appellants' motion to intervene as party plaintiffs, but without prejudice to their right to renew their motion after the court decided the issues of the enforceability and the commercial reasonableness of the Field agreement. It did, however, grant appellants standing as friends of the court.

In the district court the appellants claimed that they were entitled to intervene as of right under F. R. Civ. P. 24(a)(2) as amended in 1966.[1] They did not claim, as they

1. "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * *; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

now claim alternatively, that they should have been granted permissive intervention under F. R. C. P. 24(b). However, we need not differentiate here because appellants' grievance throughout has been that they have a sufficient interest relating to the property or transaction, viz., the sale of the collateral, to be entitled to force the sale of the stock collateral to them if the court should find that their offer exceeds the Field offer. Consequently, if they lack such an interest, they are not entitled to intervene for that purpose under either provision of the intervention rule. The district court obviously decided that they lacked such an "interest", and we agree.

Appellants concededly had no cognizable interest in the pledged property or the various financial transactions involving it before this action was commenced. They were legal strangers. Their only claim of "interest" now is that they will pay more for the stock than Field has agreed to pay. As the district court noted, appellants' offer is clearly relevant to its determination of the issue of the commercial reasonableness of the plaintiffs' agreement of sale with Field. Indeed, in connection with the pending decision in the district court of such issue, the judge has indicated that the appellants' offer will be considered. But even if the district court should find that the appellants' offer is higher in value than the amount reflected in the Field agreement, it would not follow that plaintiffs would thereby be subject to an enforceable legal duty to sell the collateral to appellants, putting aside other offers. We say this because the relief requested by plaintiffs below was bottomed on 12A P. S. § 9-507(2) (Supp. 1966) which, insofar as now pertinent, provides:

> "* * * A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively

be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable."

The statutory provision invoked by plaintiffs does not even remotely suggest, let alone require, that, once invoked, the proceedings can be turned into a judicially conducted auction sale of the subject matter. Appellants' status as would-be purchasers does not clothe them in this type of proceeding with the type of "interest" which entitles them to intervene in this action for the purpose sought by them. Appellants place great reliance on the recent opinion of the United States Supreme Court interpreting F. R. C. P. 24(a)(2) in the case of Cascade Nat. Gas v. El Paso Nat. Gas, 386 U. S. 129 (1967). The "interests" of the parties permitted to intervene therein differ so materially from that for which appellants seek recognition here as to require no further elaboration.

The order of the district court is affirmed.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16819

OLD COLONY TRUST COMPANY, UNITED VENTURES, INC., AND GABRIEL POWERS

v.

PENROSE INDUSTRIES CORPORATION, WM. PENN BROADCASTING COMPANY, REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, WILLIAM H. SYLK, HARRY S. SYLK, JONAS SENTER, SELMA KATZ, SAMUEL ROSENBLUM, SIMON ROSENBLUM, LEON J. OBERMAYER, CONSERVATOR, AND WALTER E. HELLER & CO., INC.

DAVID MILGRAM AND HIS ASSOCIATES,
Appellants

(D. C. Civil Action No. 42853)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, GANEY and SEITZ, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed July 10, 1967, be, and the same is hereby affirmed, with costs.

Attest:

THOMAS F. QUINN,
Clerk.

January 9, 1968

APPENDIX C.

MEMORANDUM SUR MOTION FOR PRELIMINARY INJUNCTION.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 42853

OLD COLONY TRUST COMPANY, ET AL.

v.

PENROSE INDUSTRIES CORPORATION, ET AL.

SUR MOTION FOR PRELIMINARY INJUNCTION AND PROOF

(DOCUMENT 2)

VAN DUSEN, *J.* June 8, 1967

For the reasons stated below, the issuance of the preliminary injunction being filed in this matter only requires the defendants to do what Penrose and the Sylks, by entering into the obligations and pledges attached to the Complaint and offered in evidence (Exhibits A and C and P-1), are bound to do. The rights of the other defendants are subject to these written agreements. The plaintiffs have been entitled to the following amounts under these obligations since 1964 and it is clear that they will not receive such sums at this time unless they are permitted to sell the pledged collateral:

Senior Note	$ 740,000
Powers Notes	$1,000,000

Furthermore, the record shows that the Sylks are resisting the proposed sale and will not supply the information contemplated by paragraph 2 of the injunction being filed herewith without the assistance of the court, even though they agreed to P-1 and the contract of 3/18/63 (Exhibit A) granting plaintiffs such information, as pointed out below.

Since defendants are free to negotiate and to try to secure a better agreement, subject to court approval, the balance of convenience in granting this limited preliminary injunction is on plaintiffs' side.

Another hearing is scheduled for June 20, by which time plaintiffs will furnish Penrose with the proposed application to the Federal Communications Commission which it wishes Penrose to sign. At that hearing, defendants may produce any firm offers which it contends are more beneficial than the May 26, 1967, agreement (Exhibit I to the Complaint).

Penrose has been in default in payments due to United under the Senior Note (originally dated in 1959 and modified in 1963) since December 1, 1964, as it does not deny its default in payments of interest due under the Powers Notes since December 1, 1964. All the stock of WPEN (a subsidiary of Penrose) has been pledged by Penrose since 1960 as security for the obligations of Penrose under the Senior Note (see Exhibit C to Complaint). Since August 1962, Penrose's interest in the above-mentioned WPEN stock has been pledged as security for the obligations of Penrose under the Powers Notes, which were issued to plaintiff Powers in that month.

In August 1962, the Sylks (two of the individual defendants, who have been principal officers of Penrose and its subsidiary, Wm. Penn Broadcasting Company, for several years) pledged all their interest in a $1,980,000 deben-

ture [1] of Wm. Penn Broadcasting Company to secure Penrose's obligations under the Senior Note and the Powers Notes, respectively.

On May 26, 1967, Old Colony, as Trustee (acting in response to demands of United and Powers), United (acting under the Senior Debenture Pledge Agreement), and Powers (acting under the Powers Debenture Pledge Agreement) entered into an agreement with Martin W. Field whereby Old Colony agreed to sell and Field to buy the Stock, and United and Powers agreed to sell and Field to buy the Debenture. Defendants offered no evidence to show (a) that the plaintiffs are not entitled to sell the Stock and Debenture on the terms and in the manner provided in the above-mentioned May 26, 1967, Agreement (Exhibit I to the Complaint), or (b) that the defaults have not existed under the pledge agreements and notes as stated above.[2]

The Sylks concede that they consider the price provided in this May 26 agreement as inadequate and did not deny that they would try to delay its consummation and that they were trying to effect what they consider to be a better value for the Wm. Penn Broadcasting Company, of which they are the chief operating officers. Their counsel would not agree to make the books and records of that company available to plaintiffs.

Plaintiffs seek a preliminary injunction enjoining defendants pending final determination and hearing of this action from:

> "(a) Issuing additional stock or changing, altering or amending the status of said Stock or amending or changing the terms of the Debenture;

---

1. This had been issued in January 1962 to the Sylks "acting for themselves and others as their interests may appear."

2. Counsel for defendants claim that the price specified in this agreement is inadequate but submitted no evidence of any firm offer to support this contention.

"(b) entering into any agrement for or consummating any agreement already entered into for the sale of assets, or any merger or consolidation, or any other act out of the ordinary course of business; and

"(c) doing any other act in violation of the covenants and terms of the loan and pledge agreements;"

Plaintiffs are entitled to the entry of the terms of paragraphs (a) and (b) of the preliminary injunction being filed with this Memorandum in view of Section 5.15 of Exhibit A. Since Complaint Exhibits A and C and P-1 were the only loan and pledge agreements received in evidence, the terms of (c) must be limited to them.

In view of (a) the failure of Penrose to furnish Old Colony, as trustee, with a statement of the financial condition of Wm. Penn Broadcasting Company for the fiscal year ended January 31, 1967, as required by paragraph 8 on page 4 of Exhibit C (August 22, 1960, agreement) and the other terms of that paragraph requiring Penrose to deliver such "papers as may be required to enable the trustee to realize upon the pledged collateral," (b) the terms of P-1 in favor of Powers, and (c) the terms of Section 5.19 of Exhibit A,[3] plaintiffs are entitled to an injunction containing the wording of paragraph 2 of such preliminary injunction.[4]

---

3. Section 5.19 on page 24 of Exhibit A includes this language: ". . . the Company covenants and agrees that any of your authorized representatives, and any authorized representative of any such Holder of Record, shall have the right to visit and inspect any of the properties of the Company and of any Subsidiary, to examine and make copies of its books of account and to discuss its affairs, finances and accounts with, and be advised as to the same by, its officers all at such reasonable times and intervals as may be requested."

4. Since Penrose and the Sylks agreed to the provisions in the foregoing paragraph, any objection that making financial records available to plaintiffs would involve disclosure of business confidences is difficult to understand, but defendants may have any documents

This injunction preserves the status quo until such time as the court is furnished with a more favorable proposition for all interested parties. Cf. *Volkswagenwerk Aktiengesellschaft v. Volks City, Inc.*, 348 F. 2d 659, 660 (3rd Cir. 1965); Note, Development In The Law—Injunctions (1965), 78 Harv. L. Rev. 994, 1058. As to the immediate and irreparable harm involved, see *United States Air Conditioning Corporation v. Fogel*, 172 F. Supp. 539, 543 (E. D. Pa. 1959), aff'd. 272 F. 2d 879 (3rd Cir. 1959).

The Memorandum filed on behalf of the Sylks makes many assertions not in the record. Mr. Sylk was not asked about any of such matters when he was called to the stand by defendants, so these assertions cannot be considered.

A hearing on Count II of the Complaint has been scheduled for 10 A. M. on July 6, subject to further discussion at the June 20 hearing.

The preliminary injunction will be issued.

.....

J.

---

covered in paragraph 2 which contain business secrets marked and suggest to the court language to be included in an order requiring plaintiffs not to disclose the contents of such documents to anyone.

The form of injunction proposed by counsel for plaintiffs and submitted at the hearing on June 7 has been marked P-2 by the court reporter.

APPENDIX D.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted in printing.)

ORDER SUR MOTION OF DAVID MILGRAM AND HIS ASSOCIATES (DOCUMENT 17).

AND NOW, July 10, 1967, after consideration of the above Motion (Document 17), the attached Memorandum of the Movants, Brief of Plaintiffs filed 6/26/67 (Document 27), other briefs and memoranda filed last week and the record, IT IS ORDERED that:

(1) the MOTION OF DAVID MILGRAM AND HIS ASSOCIATES TO INTERVENE AS PARTY PLAINTIFFS (Document 17) is DENIED, without prejudice to its renewal after a decision has been made on the enforceability and commercial reasonableness of the Field Agreement of May 26, 1967, attached to the Complaint, after the trial scheduled for July 18, or as soon thereafter as such trial can commence upon completion of the trial in United States to the use of John R. Morris Corporation v. Fred Loffredo et al., Civil Action No. 34551; and

(2) movants are granted leave to have their counsel present argument amicus curiae at the end of the above-mentioned trial to commence later this month and the ap-

pearance of their counsel shall be treated as an amicus curiae appearance until further order of this court.

FRANCIS L. VAN DUSEN,
Circuit Judge
Sitting by Designation as a
District Judge

Pursuant to the Memorandum of June 8, 1967 (Document 5),[1] movants made an agreement of June 21 but there is no basis in the record for considering such agreement has court approval. Movant's counsel concedes in the attached Memorandum that *Binenstock Trust,* 410 Pa. 420 (1963), does not apply to this case. Under such circumstances, movant is not entitled to intervene under F. R. Civ. P. 24 if the Field Agreement, admittedly prior in date to June 21, is effective and binding. The case of *Manchester Gardens v. Great Western Life Assurance Co.,* 205 F. 2d 872 (D. C. Cir. 1953), relied on by movant, did not involve application of F. R. Civ. P. 24. On the other hand, it has been held that intervention of right exists only where intervenor stands to gain or lose *by direct legal operation of the judgment. Wilson v. Illinois Central Railroad Company,* 21 F. R. D. 588 (N. D. Ill. 1957). In that case the court, quoting an earlier case, also said at 21 F. R. D. 589:

> "'Additional parties always take additional time. . . . Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

1. The following sentence was included at page 2 of the June 8 opinion (Document 5):

"At that hearing, *defendants* may produce any firm offers which it contends are more beneficial than the May 26, 1967, agreement (Exhibit I to the Complaint)." (Emphasis supplied.)

Movant's June 21 agreement and any other firm offer for the WPEN stock will be considered on the issue of the commercial reasonableness of the May 26 Field Agreement. See, also, *Skeels v. Universal C. I. T. Credit Corporation*, 335 F. 2d 846, 850 (3rd Cir. 1964). Disinterested expert testimony on the relative value of the Field Agreement, C-1, M-1, M-2, and any similar documents would probably be of great help to the court.

APPENDIX E.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 42853.

OLD COLONY TRUST COMPANY, ET AL.

v.

PENROSE INDUSTRIES CORPORATION, ET AL.

MEMORANDUM SUR NOTICE OF APPEAL FILED BY MILGRAM ASSOCIATES.

VAN DUSEN, Circuit Judge

(Sitting by Designation) August 28, 1967

This Memorandum is being filed in view of the submission of the attached proposed order to the trial judge at the start of the trial under Count 2 of the Complaint on August 23, 1967, the objections to such order stated by counsel for DAVID MILGRAM AND HIS ASSOCIATES (hereinafter "Milgram Associates") on the second and third days of such trial (August 24 and 25), and the Motion of Milgram Associates made after noon on August 25 that the Clerk be directed to have the necessary record for consideration of the August 4 Notice of Appeal forwarded to the Court of Appeals (p. 10 of Document 53).

This case involves the propriety of a private sale of pledged collateral (stock and debentures of WPEN) by pledgees after a conceded default by the pledgor. The record does not disclose any interest shown in such collateral by Milgram Associates until a June 7, 1967, hearing on application for a preliminary injunction, at which time counsel for Milgram Associates stated that they were prepared to pay over six million dollars for the assets of WPEN (N. T. 49-50 of Document 82 in C. A. 37995). Counsel also indicated at this hearing, however, that the Milgram offer above was not yet in a "concrete form" or in "a written form of agreement." (N. T. 91 of Document 82 in C. A. 37995).

At the hearing held June 21, 1967, the trial judge stated that the trial on Count 2 of the Complaint would proceed either "on or about July 18, 1967" or about August 22 (p. 218 of transcript, being Document 83 in C. A. 37995). At that hearing,[1] there was a considerable discussion as to the possible application of the Pennsylvania legal principal involved in *Binenstock Trust,* 410 Pa. 425, 432-3 (1963), that a trustee must consider higher offers for trust property until such time as a sale of such property has been carried out. It was arranged that plaintiffs would file and serve their memoranda in opposition to the application of such principle on or before June 26 and any other memoranda on this point would be filed and served no later than July 3 (page 237 of Document 83 in C. A. 37995). At this time, counsel for Milgram Associates made clear that he felt that his clients had the right to have their contract to purchase the stock of WPEN, which was delivered to the court on that date (see Exhibits M-1 and M-2), enforced, irrespective of the application of the above-men-

1. The possible application of this legal principle had first been raised at the hearing on June 7, 1967 (pp. 27 ff. and 94-95 of Document 82 in C. A. 37995).

tioned principle of Pennsylvania law binding on trustees (pp. 214-215 of Document 83 in C. A. 37995).

Thereafter, on June 26, 1967, a motion was filed on behalf of Milgram Associates (Document 17) to intervene as party plaintiffs. By letter of June 30, 1967, received July 3, 1967, which is attached to this Memorandum, counsel for plaintiff stated his objection to this motion to intervene "now," stating that "we feel that Mr. Berger's entry of appearance should be held in abeyance." On July 3, counsel for Milgram Associates filed and served its memorandum on the issue of whether the above Pennsylvania principle stated in the *Binenstock* case should apply to this record (this memorandum is attached to Order of July 10, 1967, being Document 28). On July 10, an Order was entered sur the above-mentioned motion of Milgram Associates to intervene (Document 17), ruling that "the MOTION OF DAVID MILGRAM AND HIS ASSOCIATES TO INTERVENE AS PARTY PLAINTIFFS (Document 17) is DENIED, without prejudice to its renewal after a decision has been made on the enforceability and commercial reasonableness of the Field Agreement of May 26, 1967, attached to the Complaint, after the trial schedule for July 18, or as soon thereafter as such trial can commence upon completion of the trial in United States to the use of John R. Morris Corporation v. Fred Loffredo et al., Civil Action No. 34551; . . . ."

On July 19, a letter (C-2) was sent to all counsel stating:

> "For the information of those of you who were not at the hearing this morning, I ruled that the trial of the issues presented by Count 2 of the Complaint will commence at 10 A. M. on August 23, 1967, after consideration of N. T. 200, 211 ff. and 237."

On August 4, a Notice of Appeal from the above Order of July 10, 1967, was filed by counsel for Milgram Asso-

ciates. On August 23, 1967, counsel for plaintiff submitted the attached proposed order to the court in view of the appeal of August 4, 1967, and served a copy of it on counsel for Milgram Associates. On August 24, 1967 (the second day of the trial on Count 2 of the Complaint), counsel for Milgram Associates appeared in court and stated that he objected to the proposed order submitted by counsel for plaintiff. At this time, it was agreed that counsel for Milgram Associates should be granted until Monday, August 28, to submit authorities in support of his position. On August 25, 1967, the trial judge asked the Clerk not to forward the record to the Court of Appeals until Monday, August 28, in view of the discussion held in court on August 24. After noon on August 25, counsel for Milgram Associates appeared in court and made a definite statement of his position, which has been transcribed and appears in Document 53.

In view of the record, the following are among the significant factors which have led the court to decide to suspend the trial on Count 2 of the Complaint and to have the record transmitted to the Court of Appeals at this time, until the status of the above-mentioned appeal has been determined:

A. Milgram Associates had no interest whatever in the subject matter of this case until this suit had been instituted and had not entered into a binding contract on June 7, 1967, when the hearing on the application for a preliminary injunction was held (see p. 91 of Document 82 in C. A. 37995).

B. Counsel for the Sylk Brothers and counsel for Penrose Industries, Inc. are experienced, able attorneys and adequately represent the interest of Milgram Associates in the trial under Count 2 of the Complaint.

C. Although the exact effect of filing a Notice of Appeal on the jurisdiction of this court to proceed with the above trial on Count 2 is not clear,[2] the United States Court of Appeals for the Third Circuit has said in *Plant Economy, Inc. v. Mirror Insulation Company*, 308 F. 2d 275, 277 (1962): "It is a general rule, subject to some qualifications, that an appeal suspends the power of the court below to proceed further in the case." See also, *Keohane v. Swarco, Inc.*, 320 F. 2d 429 (6th Cir. 1963).

D. No counsel in this case has indicated that this court does not have jurisdiction to conduct the trial on Count 2 in view of the Notice of Appeal filed August 4 and counsel for Milgram Associates has taken the position that this court will have power to act even after the docketing of the appeal (pp. 6 and 12 ff. of Document 53).

E. Counsel for Milgram Associates made clear after noon on August 25 that he is unwilling to agree to delay in the docketing of its appeal (p. 10 of Document 53).

Under the above circumstances, the Clerk will be asked to prepare the record for transmission to the United States Court of Appeals for the Third Circuit as soon as possible. In view of the uncertainty as to the present effect of Local Rule 16 of the U. S. Court of Appeals for the Third Circuit on F. R. Civ. P. 75(f), as revised in 1966, it is suggested that counsel for plaintiffs at least file a motion to remand the record to this court so that, after such remand, it may transmit, in lieu of such record, a certified copy of the docket entries and such parts of the record as this court

2. The U. S. Court of Appeals for the Second Circuit has indicated that the District Court may not lose jurisdiction until the appeal has been docketed or even thereafter. See *Ryan v. U. S. Lines Company*, 303 F. 2d 430, 433-434 (1962); *United States for Use of Browne and Bryan Lumber Co. v. Massachusetts Bonding & Ins. Co.* 303 F. 2d 823, 829 (1962), cert. den. 371 U. S. 942 (1962).

shall allow. If the Court of Appeals agrees to such remand, having had its attention called to the notice of Appeal and the finding in paragraph B above, the trial may then continue. It would seem sensible for any such application for remand to include a motion to dismiss the appeal, unless counsel for Milgram Associates agrees to the hearing of the appeal on the merits on September 11, 1967, or the Court of Appeals directs that such appeal should be heard on such date.

/s/ FRANCIS L. VAN DUSEN,
Circuit Judge
Sitting by Designation as a
District Judge

APPENDIX F.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted in printing.)

ORDER AMENDING MEMORANDUM (FILED AUGUST 28, 1967) SUR NOTICE OF APPEAL.

AND Now, August 29, 1967, after consideration of the comments made yesterday by counsel on the above Memorandum, IT IS ORDERED that:

(a) the next-to-the-last sentence of such Memorandum (page 6) is modified by inserting before the word "finding" the words "record, including the fact that Milgram Associates is only a potential bidder and the," so that such sentence reads:

> "If the Court of Appeals agrees to such remand, having had its attention called to the Notice of Appeal and the record, including the fact that Milgram Associates is only a potential bidder and the finding in paragraph B above, the trial may then continue."

and

(b) this sentence is substituted for the last sentence (page 6):

> "The interests of a great many people and substantial sums being involved in the declaratory judgment ac-

tion under Count 2 of the Complaint, it is desirable that the trial on such Count may be resumed as promptly as possible."

/s/ FRANCIS L. VAN DUSEN,
Circuit Judge
Sitting by Designation as a
District Judge

This order is being filed shortly after noon on August 29 and it is noted for the record that the only additional authority received from counsel this morning is *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 308 F. 2d 856 (3rd Cir. 1962), where the court used this language at page 860 on the subject of permissive intervention:

"It is always a consideration against permissive intervention that additional parties 'take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like * * *.' [Citing case.] Of course, Rule 24(a)(2) expressly commands that in exercising its discretion upon an application for permissive intervention the court shall consider the delay involved."

APPENDIX G.

ORDER OF SEPTEMBER 14, 1967.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16819

(Title omitted in printing.)

Present: KALODNER and SEITZ, *Circuit Judges.*

Upon consideration of the appellees' motion to order remand to the United States District Court for the Eastern District of Pennsylvania of the record in C. A. No. 42853 therein, so that a pending trial, suspended by the District Court by reason of the filing of the instant appeal, may go forward, and the opposition thereto, and after hearing, all in the above-entitled case,

It is ORDERED that the record in C. A. No. 42853 be returned to the stated District Court except insofar as it relates to the subject matter of the instant appeal, viz., the denial of the appellant's motion to intervene in said Civil Action;

And it is Further ORDERED that the alternative motion for peremptory dismissal of the appeal be and hereby is denied;

It is Further ORDERED that the Clerk of this Court list this case for argument on Friday, November 3, 1967.

By THE COURT,

KALODNER, *Circuit Judge.*

Dated: September 14, 1967.

APPENDIX H.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 42853

OLD COLONY TRUST COMPANY, UNITED VENTURES, INC., AND GABRIEL POWERS,
Plaintiffs

v.

PENROSE INDUSTRIES CORPORATION, WM. PENN BROADCASTING COMPANY, REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, WILLIAM H. SYLK, HARRY S. SYLK, JONAS SENTER, SELMA KATZ, SAMUEL ROSENBLUM, SIMON ROSENBLUM, LEON J. OBERMAYER, CONSERVATOR, AND WALTER E. HELLER & CO., INC.,
Defendants

and

THE BORDEN COMPANY,
Intervenor Defendant

OPINION SUR PLEADINGS AND PROOF UNDER COUNT II OF THE COMPLAINT (Order on Page 43).

This case concerns a sale of collateral under Article 9 of the Uniform Commercial Code. It is now before the court after a non-jury trial on the issues raised in Count II of the Complaint: an action seeking a declaratory judgment[1] that the plaintiffs' sale of collateral was "commercially reasonable" and otherwise lawful.

1. 28 U. S. C. § 2201. Jurisdiction is founded on diversity and the requisite amount in controversy.

History of the Case.

The Complaint was filed June 1, 1967, by certain secured parties in this commercial transaction and the trustee holding the above mentioned collateral. The named defendants included various other secured parties, allegedly junior in lien, the debtor, and its subsidiary. Also named as a party defendant was Leon J. Obermayer, who was appointed Conservator by this court with respect to certain assets of the debtor on May 11, 1965, in Civil Action No. 37995. Attached to the Complaint was a contract for sale of the collateral held by the plaintiffs, the common stock of a radio station (the debtor's wholly-owned subsidiary), which contract had been signed May 26, 1967. Count I of the Complaint sought preliminary injunctive relief to enable plaintiffs to consumate the sales contract. After a hearing on June 7, 1967, a preliminary injunction was granted by order of June 8, 1967, and modified after a further hearing June 13, 1967. These orders, declaring that defaults had occurred under the various agreements outlined below, enjoined the debtor or its officers from various acts which would alter the value of the collateral and required their cooperation in providing financial and other information as covenanted in the various security or pledge agreements (Documents 5 and 8). A third hearing was held June 21 on whether to require cooperation of the debtor and its subsidiary with the plaintiffs in their application to the F. C. C. for change in control of the radio station.[2] As had been discussed in the previous hearings, the court also stated its

2. At the June 1 hearing, it was argued that requiring cooperation in the F. C. C. application would effectively eliminate further offers for the collateral stock. It was unclear at that time whether such later offers should be considered by the court and, if so, whether they were merely evidence of the collateral's value or could be used in a judicial sale if it should be held. The problem of additional offers

willingness to receive any other firm offers for the collateral radio station stock at this hearing to be used as evidence in deciding the issues under Count II. One such offer by David Milgram and Associates was followed by their motion to intervene as plaintiffs (Document 17 of June 26). After argument and briefing on the issue of what status such offers should have in this case, the court on July 10, 1967, denied the motion to intervene (Document 28), but gave Milgram leave to present argument amicus curiae at the end of the trial on Count II. This decision has been affirmed by the United States Court of Appeals for the Third Circuit (No. 16819) — F. 2d — (January 9, 1968). Inherent in this order was the conclusion by the court that such offers were relevant in this case only as evidence in the determination of "commercial reasonableness" under Count II. A fourth hearing on July 19, 1967, resolved the issue of a possible jury trial and scheduled the trial to the Court for August 23, 1967. The actual trial took 13 days and produced 2027 pages of testimony and over 100 exhibits.

Discussion.

A. *Facts.*

Penrose Industries Corporation ("Penrose") is indebted to the plaintiffs, United Ventures, Inc. ("United") and Gabriel Powers ("Powers"). United holds certain "senior notes" currently being $740,000 principal amount of 5½% interest-bearing notes. Powers also holds certain

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(for the purpose of the requested equitable relief seeking cooperation in such application to the F. C. C.) was moot, by July, since the court had set June 21 deadline for such offers regardless of their evidentiary or substantive status. Counsel for the radio station, however, gave additional reasons for not then requiring full cooperation on the F. C. C. application. Accordingly, decision on that part of Count I has been reserved. See below.

notes ("Powers Notes"), being $1,000,000 principal amount. As security for these notes, Penrose pledged on August 20, 1960 and August 21, 1962, respectively, the entire capital stock of its wholly-owned subsidiary, William Penn Broadcasting Company ("WPEN"). The plaintiff, Old Colony Trust Company ("Old Colony"), is acting as trustee for United and Powers under the "Senior Stock Pledge" agreement with United and the "Powers Stock Pledge" agreement with Powers.

Defendants William and Harry Sylk ("Sylks") are the chief officers of WPEN and Penrose and effectively control them both. On January 31, 1962, WPEN issued a debenture ("the debenture") to the Sylks, "acting for themselves and others as their respective interests appear." This debenture was then pledged on August 21, 1962 to United and Powers as additional collateral to secure the debt Penrose owed the plaintiffs (the "Senior Debenture Pledge" agreement and "Powers Debenture Pledge" agreement, respectively). Since December 1, 1964, Penrose has been in default under all these agreements as determined in the findings, and order of June 8, 1967 (Document 5) and as more fully shown at trial. Although the Powers Notes provided for no interest for the first five years, this was waived by Penrose on July 13, 1966 (P-79), when it agreed to pay Powers his interest from December 1, 1964, at 6% per annum as consideration for Powers not fully enforcing his rights under the original note purchase agreement with Penrose (dated July 1, 1962), which would have required the immediate sale of the WPEN stock in December 1964 (par. 1B of P-77). Accordingly, United and Powers, as the two most senior secured parties, seek payment from the collateral of $1,740,000 principal amount of indebtedness, plus interest owed, plus the reasonable expenses and attorneys' fees

incurred by them and the trustee, Old Colony, in efforts to realize on this collateral.

Since December 2, 1964, there is no question that Penrose, the Sylks, and the other secured parties junior to United and Powers have had ample notice that the first two secured parties wanted to sell the collateral.[3] Powers was also informally in touch with the Sylks throughout the period since December 1964 and for purposes of such communication, the Sylks were both principal officers of the debtor Penrose and junior secured parties as well.

For various reasons, however, the secured parties have been unable to negotiate a contract of sale for the WPEN stock until now. To begin with, the Sylks have generally been opposed to any sale, WPEN being perhaps the most valuable remaining asset of Penrose (see N. T. 6/7/67—60-66). Since May 11, 1965, a Conservator has been attempting to realize the maximum amount from certain assets of Penrose in a capacity similar to that of a common law receiver (Civil Action No. 37995) and has made known his claim to this asset. During this period, WPEN has perhaps been Penrose's most valuable asset and pays the Sylks both a generous salary and rents as a landlord, which one appraiser found to be comparatively high (P-14). WPEN has apparently also been useful during the Penrose insolvency as a guarantor for certain Penrose obligations.[4] Both before and after the Conservator was appointed, having the stock of a radio station as collateral was apparently quite useful for Penrose and the Sylks. F. C. C. regulations prevented the secured parties from controlling the station even though they had the stock [47 U. S. C. § 310(b); see, e.g., *Lorain Journal*

3. P-10, P-11, P-20, P-26, P-34, P-80, P-81, P-63, P-65.

4. WPEN has apparently guaranteed rent payments to a Penrose landlord (one "P. Carrier," see P-49) and is a guarantor under certain agreements between Penrose and the Conservator (see P-53).

Company v. F. C. C., 351 F. 2d 824 (D. C. Cir. 1965), cert. den. 383 U. S. 967 (1966)], and with the stock held by a trustee, junior interests could be created, slotted, or rearranged to provide flexible collateral for many situations. It appears from the testimony and many exhibits that the group of secured parties below United and Powers included the Philadelphia Redevelopment Authority, Walter E. Heller & Co., Inc. ("Heller"), Jonas Senter ("Senter"), and the Sylks in a complex of priorities that need not be determined in this decision, but one which shows an additional reason the Sylks wanted any sale delayed if possible.

Against this background of a conservatorship claiming an interest in the collateral and opposition from those who had effective control of the "collateral" radio station, the plaintiffs had to attempt a sale if they were ever to secure repayment of the amounts owed them. After the default notices of December 2, 1964 (P-10), Old Colony and Powers demanded, without success, (P-11, December 11, 1964) that the Sylks honor their agreement of July 1, 1962 (P-78) wherein they had promised personally to purchase the stock of WPEN for $3,500,000 in the event of default.

The plaintiffs' next step was to secure a competent appraisal of the value of the WPEN stock. In January 1965 they employed Mr. Harvey of Blackburn and Company, an experienced and highly reputable "media broker" who had made approximately 200 to 250 appraisals in his career.[5] He valued the stock at $5 million.

At a meeting in late December 1964, the Sylks and others agreed to form "Quaker Broadcasting Company"

5. Of all the experts produced, Harvey's testimony seems entitled to the greatest weight in light of his significantly greater experience and that of his firm. It should be noted that at least some inadequacy was inherent in any appraisal done by the plaintiffs, since they had an extremely difficult time obtaining the financial information required to be made available under the several pledge agreements. This was part of the relief granted in June 1967 to plaintiffs under Count I of the Complaint.

("Quaker") and purchase the collateral from Penrose for themselves (P-87). Powers, who attended the meeting, was asked to get Old Colony to delay their efforts toward making any sale. This he did (P-17). On advice from his lawyer in February, however, Powers insisted that the sale be made through Old Colony since there was danger that the Quaker-Penrose deal was not "at arm's length" (P-87, P-21) (N. T. 930 ff.). The negotiations between Old Colony and Quaker were apparently temporarily fruitless due to the problems facing the Sylks with Penrose creditors and the conservatorship of May 11, 1965 (P-39). The deal had reached the draft stage, however, in April (P-21, P-22, P-23).

During the summer of 1965, interest in the stock was shown by two mid-west groups and a Cincinnati broker in particular. Despite active efforts by Powers to encourage these offers,[6] the fact that stock only (and not assets) was for sale, plus financing problems, soon ended these offers (P-27, P-28, P-30, P-29, P-33).

The alternative of public bidding, or at least bidding by invitation to a limited group, had been considered at the outset in December 1964. The experienced advice of Mr. Harvey was that negotiated sales would bring a higher price given the unique nature of broadcasting properties.[7] In the fall of 1965, however, all active interest in WPEN having waned, the plaintiffs and their counsel again considered the possibility of sale by a limited public offering (DS-15, P-35, P-42, DS-10, DS-11). This idea was discarded

6. Powers flew to the mid-west and even visited banks to seek financing for one party.

7. See P-13. Public bidding apparently depressed the value of a radio station until the closing because it adversely affected earnings by deterring advertising contracts and depressing employee morale.

again, however, due to the S. E. C. and other legal problems (P-59, DS-11) and apparently due to a new round of parties interested in a negotiated deal. Powers received one $2 million offer (P-44) and United's counsel was actively negotiating with a party in Philadelphia.[8] Quaker apparently also revived its interest at this time (P-46), although Powers was sure any Quaker offer would again prove fruitless (DS-15).

In December, Martin W. Field ("Field") and the plaintiffs entered active negotiations and by January 1966 had virtually concluded a deal. The plaintiffs had both formally and informally investigated Field's ability to pay for the stock and were satisfied he could perform his obligations under the contemplated contract of sale. The transaction bogged down, however, when the Sylks threatened to cause a default under the WPEN debenture[9] (DS-23) and the plaintiffs decided that they had to sell both the stock and the debenture together. At this point, the Fields withdrew from negotiations (P-56). During this period, the Sylks continued to press their revived Quaker offer (P-50) but, by the analysis of Old Colony's counsel made in Feb., 1966, their offer did not appear as valuable as the Field offer (P-54). Whether or not the comparison was correct, and it appears that it was substantially accurate, the trustee had to be concerned with the Sylks' involvement with Quaker. Such a sale was potentially one not at arm's length, and with the underlying insolvency of Penrose, Old Colony might be liable to suit by Penrose's creditors and others. Moreover, once Field withdrew, the Quaker offer was not pressed again. As Powers testified (N. T. 982-83), every time the plaintiffs got active on a sale, the Sylks also would get active. This pattern has continued to date.

8. This prospect subsequently bought a station in Camden.

9. This the Sylks could always do, since the pledges could not interfere with their control of WPEN due to F. C. C. regulations.

During 1966, "tight money" apparently made buyers even less willing (N. T. 989-990). The Sylks and the other principal in Penrose, Jonas Senter, tried to get Powers to delay again [10] while they made some new financial arrangements involving the WPEN collateral [11] and the structure of Penrose.[12] At the end of the year, Powers tried to revive the Field interest (N. T. 1059 ff.) and a limited public sale was again mentioned (P-59).

In late January 1967, the plaintiffs received a second show of interest from Field (P-61, DS-16). They began active negotiations immediately, asked Mr. Harvey to update his appraisal (DS-13, P-71), and over the period of three months finally hammered out a contract of sale for both the stock and debenture of WPEN. The ability of Field to consummate such a deal financially was again investigated and found satisfactory by the plaintiffs and their agents.[13] The contract was signed May 26, 1967, and by

10. This is when Penrose agreed to pay Powers interest on his $1,000,000 at 6% from 12/1/64—P-79.

11. See P-7, P-58, DS-8, DH-2, H-2, H-3: a new "slot" was created in August 1966 with Senter as "Trustee," WPEN as collateral, the Sylks and Senter sharing $1,106,240.89, and the Sylks subordinating their prior $1,000,000 loan (DS-8) and their debenture interest (DH-2).

12. N. T. 1033 ff. Apparently this transaction involved the spin-off of a corporation Senter had merged with Penrose several years before (N. T. 1037 ff.).

13. Such investigations included confidential bank checks and use of personal contacts with insurance companies that apparently knew in detail about Field's extensive real estate transactions and holdings. The defendants put great stress on the failure of the plaintiffs to obtain an audited statement of Field's net worth and failure to ascertain ahead of time that Field could qualify before the F. C. C. It does not appear, however, from any evidence or testimony, that an audited statement of personal net worth was the best indication of Field's financial ability; and to the contrary, creditable testimony of experienced businessmen indicated that such information was of less value on a man with Field's activities than a check with the responsible institutions who loaned him money. On the F. C. C. point, it does not appear necessary or proper to anticipate F. C. C. proceedings in this court. The contract of sale is terminated if F. C. C. approval is not secured.

notice of that date, the debtor was further given until June 7, 1967, to redeem the stock (P-82); all other parties were given additional notice of a sale to take place the same date (P-72). During the February to May 1967 negotiations, the Sylks came forward in April 1967 with another offer, one from "Welcome Radio," for the purchase of WPEN's assets. Although the offer was never put into concrete or final form during the time of these Field negotiations, "Welcome" was apparently also willing to buy stock. During May 1967, the Sylks were not given a copy of the Field contract they sought to use as a model for a "Welcome" offer because the principals would not authorize Old Colony's lawyer to distribute a copy. It was not shown that this failure either caused "Welcome" to withdraw or prevented their making a firm offer for the stock. Rather, it showed the plaintiffs' concern for not allowing the Field negotiations to be undermined, since they were finally close to a sale after over two years of fruitless efforts.

The Field Contract, as finally signed, is a complicated document in detail, yet relatively simple in concept. Since the sale was non-consensual as far as the Sylks, and hence Penrose and WPEN, were concerned, it was impossible for Old Colony, Powers or United to make or obtain any of the warranties that normally accompany such a sale of stock.[14] Furthermore, since the plaintiffs had not been given adequate information of the financial condition of WPEN, provision had to be made for what might turn up which would increase or decrease the value of the station, and the stock, materially.[15] Several items on the WPEN balance sheets listed as assets were advances to the insolvent parent, Penrose. Their probable value was negligible. Similarly,

14. N. T. 1431, 354. There was testimony that lack of warranties would eliminate prospective buyers (N. T. 262, 350).

15. There was testimony, for instance, that the Sylks had alleged that they took considerable cash out of WPEN (N. T. 6/7/67, 60-66).

certain liabilities of the corporation looked as if they could be reduced or eliminated if subjected to an "arm's length" test or renegotiation.[16] To deal with these and similar unknowns, and to allow the purchase price to be adjusted for the changes in WPEN occuring between the most recently available certified financial statements of January 31, 1966, and the closing, the Field contract of sale provided for adjustments and escrows. To facilitate an adjustment for net worth changes, the contract defines certain categories of "deductible assets," and "deductible liabilities."[17] By using these definitions in the contract, net worth, as described by the contract, can be computed by the accountants named in the contract: Peat, Marwick, Mitchell & Co. A second adjustment was provided which would allow commutation of leases should they prove unreasonable or differ from "fair value."[18]

Two escrows were also provided in the contract. The first again had its own contract definitions—"rejectable assets and rejectable liabilities"—and was computed tentatively by the accountants. The second escrow, for "undisclosed liabilities," was a $300,000 escrow to be disbursed at $100,000 a year if such liabilities do not appear. In this fashion, both buyer and seller have protected themselves against the unknowns in this "warrantless" situation. Although defendants have argued that all these provisions in

16. This included in particular certain leases and salary contracts. Throughout this case, the Conservator of Penrose has indicated that he may challenge the WPEN debenture originally taken down by the Sylks. This challenge, if successful, would lower WPEN liabilities by $1,980,000 and increase the purchase price Field must pay by the same amount.

17. In essence, Deductible Assets are those acquired in a transaction between WPEN and controlling persons of WPEN. Deductible Liabilities are all liabilities except leases, services to be rendered, and Rejectable Liabilities (being certain future contracts between WPEN and Penrose, Sylk dominated companies and insiders).

18. One appraisal of WPEN, for example, indicated that the Sylks paid themselves as landlords an allegedly inflated rent (P-14).

the contract will aid the buyer, it should be noted, for instance, that to the extent "deductible assets" are actually collected in the future, the buyer must pay the sums over the seller. Similarly, if WPEN makes profits since January 31, 1967, these two will increase the buyer's price.

Under this contract, simple in concept but difficult to compute under the various definitions, the accountants have prepared a preliminary pre-closing audit based on figures as of January 31, 1967 (DS-6). This gives an accurate idea of what the buyer, Field, is paying for the stock, although, of course, such information may well be subject to some change before the post-closing audit since the Sylks control the operations of the radio station. The purchase price that the plaintiffs will receive under the Field contract is as follows:

(1) $5,000,000 for the fair value of the assets as of their appraisal based on audited statements of January 31, 1965;[19]

(2) plus $22,535.69, the net worth adjustment for changes from January 31, 1965, to January 31, 1966, a total of $5,022,535.69;

(3) minus $169,190, the net worth adjustment as defined in the contract, reflecting the decline in WPEN from January 31, 1966, to January 31, 1967.

This means Field pays $4,853,345.69 for the station if all the figures on the balance sheets represented collectible, enforceable, legal obligations and assets. The adjustments, however, for the lack of warranties and contingencies explained above, lower the cash paid or delay the cash paid by,

19. The most recent statements available when the Field Contract was signed.

(4) Rejectable Liability reserve $151,636, and

(5) Escrow for Undisclosed Liabilities $300,000.

Hence $4,401,709.69 represents the total cash to pass hands at once (unless the fair value of radio station WPEN's leases is found to be lower than that computed from previously audited WPEN financial reports).[20]

Item (3) above, Rejectable Liability Reserve, was potentially a $341,880 deduction under the accountant's preliminary computation. Mr. Field, however, clearly stated in court[21] that he waived his right to so segregate $190,244, which represented certain employment contracts, from the cash to be paid at closing. Without otherwise ruling on such contracts, we hereby make our finding conditional on a waiver of this amount being a binding contractual undertaking on the part of Field, enforceable if necessary by parties to this litigation who are not parties to the Field Contract.

Considerable testimony, a great many exhibits, and many pages of briefs concerned the problem of whether the Field price, as outlined above, was a commercially reasonable price. The attack by the defendants was two-fold: (1) the station had not been appraised properly by the plaintiffs' expert, and (2) other parties were willing to pay more for the WPEN stock.

Although the testimony of the defendants' four experts is admissible under our liberal Federal Rules, see e.g., *United States v. 60.14 Acres of Land,* 362 F. 2d 660 (3rd Cir. 1966), the lack of experience of these experts as com-

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20. In other words, it seems impossible that the full lease value of $346,625 will be deducted, or even that a substantial portion of this figure will be found unreasonable. Furthermore, as noted above, the price will go up if WPEN has post-January 31, 1967, earnings, or if Penrose, the Sylks, or other insiders pay back certain sums advanced to them by WPEN.

21. See N. T. 1294-1298.

pared with the plaintiffs' expert and the often highly qualified nature of their valuations entitles their conclusions to less weight.[22] Moreover, two of these experts placed greatest emphasis on valuation by a "multiplier" of gross advertising billings as derived from other radio station sales. Unfortunately, their derivation of such a multiplier was not from closely comparable sales or situations and two of the experts seemed quite devoid of much experience in the valuation of radio stations in the highest population centers or "markets." Accordingly, the stock appraisal of plaintiffs' expert at approximately $5 million seems both supportable, accurate and commercially reasonable.[23] Furthermore, as to defendants' second line of argument, analysis of the so-called competing "bids" seems to show that the plaintiffs' price was supported by the market place.

The four competing bids so strenuously emphasized by the defendants are difficult to compare with the Field Contract. Their terms vary substantially from each other and from the Field sale. In one form or another all except the Field Contract contemplate consensual transactions—ones in which the Sylks, as the controlling parties of Penrose, bind themselves to cooperation. Furthermore, the other bids likewise demand some consensual re-positioning or refinancing of junior secured parties, including again the Sylks in their dual role as secured lenders to Penrose. A third major difference is that all the competing bids involve "paper," deferred payment that would apparently be accomplished by using among other sources the expected cash

22. Expert Gregg was an allegedly willing buyer of WPEN, but in the past he had employed plaintiffs' agent-broker for his own company and in 1965 had termed Mr. Harvey's appraisal of WPEN "fair." The other experts were all employed with the litigation in mind and with the Field and other offers "on the table."

23. Since the Field contract provides for a substantially equal price, subject only to reasonable adjustments, the Field "price" is similarly commercially reasonable in light of all the expert appraisal testimony.

flow of WPEN to pay certain junior secured parties.[24] In all instances, evaluating such debt is difficult and the potential deviation of present value from the principal amount of the debt is quite large in the face of the extremely high interest rates charged in today's market for such financing. It should be noted, also, that the three latest bids also involved purchase of the WPEN stock only, not the stock and debenture the Fields had to agree to buy. All of these factors, especially the presence of various guarantees by the Sylks, would automatically make such a buyer willing to pay more. At the very least, the anticipated costs of litigation are far lower. Nonetheless, the "competing" bids still do not differ substantially from the Field sale.

Briefly, the four competing bids may be summarized as follows:

(1) The "Quaker Broadcasting" offer of 1964-65. Even if this offer was substantially equal to Field's in cash value,[25] it had the almost prohibitive taint (for the trustee-seller) of being an effort by the Sylks to sell WPEN consensually (between Penrose and their new corporation) to themselves (P-87) when Penrose was insolvent. As noted above, there is some question whether the Quaker offer was ever really firm and was not rather a Sylk effort to head off the first round of negotiations with Field in the winter of 1965-66.

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24. All these "non-cash" deals assume the junior secured parties will agree to take "paper" or can be required to do so. On the contrary, the plaintiffs would seem derelict in their duties if they left junior parties to look to the future performance of WPEN under new management, or the future earnings of some new and strange corporation. Such treatment by the plaintiffs might itself have been not commercially reasonable in the circumstances of this case. On the other hand, the alleged "third" position is held by the redevelopment Authority of Philadelphia, a public body, which has maintained that it can and will accept only cash (N. T. 1882).

25. See P-54, where the problems of trying to fix a cash value to the restructuring of the junior liens are made clear.

(2) The "Welcome" offer of Spring 1967. This is the only other offer to be made before the Field sale which is allegedly for a higher price. Unfortunately, the offer was at most times an offer for assets, and thus impossible to compare since the plaintiffs had only stock and a debenture to sell. Moreover, in its latest and most concrete form,[26] it was a cash offer of only $2,522,000[27] accompanied by proposed consents of junior secured parties, by $2,800,000 of new debt, and by common stock of a "new" WPEN subsidiary and common stock of the financially insubstantial and smaller corporate-parent buyer (DS-25, N. T. 150-51, P-68, P-70). While the value of such equity stock would be pure speculation, the $2,800,000 face amount of debt would have a considerably lower present value, even assuming the paper was marketable.

(3) The "Milgram" offer, referred to above, was made after the Field Contract was executed, and offers $3,000,000 cash plus a note for $1,020,000. The evidence indicates that such a note would have a present value of approximately $924,410. With further adjustments of approximately $145,000[28] and placing a present value on the debenture of $1,089,000,[29] the total "cash value" of the Milgram proposal

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26. There is again a substantial question whether Welcome ever made a firm offer (C-1, C-1a, P-68, P-69, DS-25); and the proposed consents of junior parties were never obtained.

27. N. T. 1828-29. But at N. T. 1822, Mr. Sylk, an "insider" on the Welcome offer, seemed to say only $1,742,000 in cash was being paid.

28. This includes undistributable earnings of WPEN and Sylk employment contract adjustments, as specified under the Milgram proposal.

29. This debenture was valued at 55% by a clearly qualified expert, assuming that the debenture was free from the right of set-off included in the Milgram offer. It is noted also that Milgram not only was buying just stock, but the debenture was to be delivered free and clear by the plaintiffs and then subordinated to the debt.

($4,868,410) confirms the Field price—both being subject to the same set-offs for worthless assets and undisclosed liabilities.[30] As a matter of evidence, the Milgram proposal confirms the fact that the Field price was at the "market."

(4) The LIN offer of September was made during the trial and in no way was ever a firm offer; it was merely a firm invitation to deal. The cash value of the LIN offer for the stock only is virtually impossible to evaluate, since, as a condition to their $3,500,000 in cash and $3,000,000 in notes, they demanded the Sylks' consent to cancellation of the debenture and certain other obligations (DX-18b). It is difficult to assume, for purposes of comparing offers or otherwise, that the Sylks individually or on behalf of Penrose, would give the consents and other warranties required by LIN, particularly in view of the history of the Sylks' opposition to all past efforts to liquidate this collateral by sale to third parties. The valuation of the $3,000,000 note is impossible since the principal amount was subject to set-off for any breach of the extensive warranties demanded of Penrose, failure to cancel the debenture, etc. If such a note had a present value of 50%, the LIN offer would be substantially equal to the Field price, and a qualified expert testified that such a note could not even be marketed as such (N. T. 1988).[31] It should be noted in compar-

30. The Milgram proposal has a far larger sum available for set-off—the full face of the debenture—as opposed to the two Field escrows.

31. The LIN proposal, while requiring the Sylks' rather extensive cooperation as in all the other proposals, was at least the only proposal in which it was clear the Sylks were not potential "insiders" of the offeror or the offering group. See the discussion above and N. T. 1776-77 as to the Sylks' possible status in the Milgram group. Assuming that various junior secured parties would have agreed to deferred payment of their claims, and that the finally negotiated sale

ing all four offers with the Field sale that even the defendants' experts testified that the absence of the elements of a sale consented to by the Sylks would either substantially reduce the value of the stock or might even deter any offer at all (N. T. 1129, 1431).

Although this decision determines only the rights of the two most senior secured parties, it is clear from the record that various junior parties have a security interest in the WPEN stock and have so notified Old Colony. Without making any determination as to priorities, it can be noted that Old Colony was aware of a junior lien for at least $800,000 asserted by the Philadelphia Redevelopment Authority,[32] a junior lien of approximately $1,106,240.89 on which Jonas Senter acted as trustee and under which lien position Senter and defendant, Walter E. Heller & Co. both claimed a senior position,[33] and a junior lien of $1,000,000 allegedly held by the Sylks as a result of a loan made to Penrose in 1962, contemporaneous with Powers' original loan.[34] Defendant Heller insists that the senior

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to LIN would have contained the required warranties and other undertakings of Penrose and the Sylks (including the cancellation of the WPEN debenture) the LIN offer does appear to offer more "consideration" for the WPEN stock than any other offer in this record. It should be noted, however, that as plaintiffs point out, LIN's heavy debt structure at the present, as revealed in a recent "red herring" (P-88), may cast some doubt on LIN's ability to perform the $3,000,000 of deferred payment.

32. The brief of the Redevelopment Authority of the City of Philadelphia asserts this lien is approximately $1,100,000 principal amount and also is secured by the Debenture.

33. Heller obtained its interest as assignee of interests originally held by the Sylks.

34. The plaintiffs estimate at page 89 of their brief that the total amount of liens against the stock is approximately $4,630,000 (and some of these liens are also secured by the debenture). Defendants William H. and Harry S. Sylk estimate at page 40 of their brief that the liens against the stock are $3,916,940.40 but describe them as the "first four liens." Defendant Walter E. Heller & Co. in its brief, page 4, describes total liens in the stock and debenture as "well over $4,000,000 plus interest and costs."

parties United and Powers satisfy their claims first out of the proceeds of the debenture held by the senior parties, since the debenture is subordinated to Heller's position.

It is also conceded by all parties that sometime in 1963 William Sylk personally paid $181,000 in interest on the senior notes to the senior pledgee (now United), and that his right of subrogation for that amount has been assigned to Heller (DH-1). Accordingly, to the extent that United receives full payment of its claims, the $181,000 in interest it has received and set aside is payable as a senior claim to Heller as assignee of William Sylk.

Rulings on Requested Findings of Fact.

Plaintiffs' Proposed Findings of Fact (Document 77) Nos. 201 through 215, 301, 302, 305, 306, 307 are granted; the words "a competent and adequate" are substituted for "an accurate" in No. 303; No. 308 is rephrased "It is reasonable to believe that Mr. Martin Field has the ability to carry out all the provisions of the Field Contract"; No. 401 is rephrased "The price contained in the Milgram Agreement does not provide sufficient cash to pay all allegedly 'secured' parties and the cash equivalence of the Milgram proposal does not differ materially from the Field price"; No. 402, add "allegedly" before "secured parties"; No. 403 add the phrase "before execution of the Field Contract on May 20, 1967, when" after the word "period." Nos. 303, 308, 401-403 are granted as modified.

Requested Findings of Fact of defendant Penrose Industries (Document 79) Nos. 1 through 5 and 8 are granted; Nos. 6, 7 9, 10, and 12 are denied; the word "active" is substituted for "any" and the words "seek out another" for "find a" in No. 11, and No. 11 is granted as modified.

Suggested Findings of Fact on behalf of William H. Sylk and Harry S. Sylk (Document 78) Nos. A(3), B(1)(a),

B(2), B(11) [substituting "did not" for "omitted to"], C(3)(a), C(7), E(2)(a), and G(3) are granted. Nos. A(2), A(4), A(7), B(1)(b), B(6), B(8), B(10)(b), C(1), C(4), C(5), C(8), C(9), C(10), D(1), D(2), E(1), E(4), E(5), F(1) through F(4), G(1) and G(2) are denied. All others are granted only as they conform to the findings in this opinion and are not conclusions of law; they are denied in all other respects.

B. *Law.*

As a matter of law under the contract obligations set forth in the exhibits attached to the Complaint, Penrose is in default under the Senior Note and the Powers Note and has been since December 1, 1964 (see Order of 6/8/67, Document 5). Under these same contracts, the plaintiffs have the right to sell both the stock of WPEN and the debenture, and the defendants Sylk have expressly waived their right to urge either the equity of marshalling or any rights they claim by dint of their alleged status as "mere guarantors."[35]

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35. See Exhibit G of the Complaint for example, paragraph 8:

"¶ 8. Any holder of Secured Obligations may at any time without impairing or releasing his rights hereunder . . .

"(b) Sell, exchange, release or otherwise deal with any property by whomsoever at any time pledged or mortgaged to secure the Secured Obligations held by him; . . .

"(d) Exercise or refrain from exercising any rights against the Company and others."

This makes it unnecessary to comment specifically on the several cases cited at pages 17-22 of the Sylks' brief (Document 78) and in the letters of November 29 and December 14, 1967, which have been attached to Document 78. As to such authorities of the defendants Sylk, see pages 3 and 4 of plaintiffs' reply brief (Document 80); and pages 5-7 of brief of defendant Walter E. Heller & Co. (Document 81) together with their letter of December 11, 1967 attached thereto.

All of the contracts and pledges governing this transaction stipulate that the law of Massachusetts will govern [36] with the exception of the Note Purchase Agreement under which Powers took down his notes subject to the Pennsylvania Uniform Commercial Code (P-77). This stipulation is in keeping with § 1-105 of the U. C. C.,[37] since the location of both Old Colony and the stock certificates in Massachusetts provides a "reasonable relation" to the State of Massachusetts.[38]

The question for decision, therefore, is whether or not the sale of this collateral fits the requirements that the U. C. C. imposes upon secured parties who seek a remedy after default by realizing on pledged collateral. U. C. C. § 9-501. More specifically, at issue here is whether the plaintiffs have satisfied the requirements of § 9-504(3):

> "Disposition of the collateral may be by public or private proceedings . . . but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. . . . [R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor,

36. The Senior Stock Pledge stipulated Massachusetts Uniform Commercial Code (Exhibit A, ¶ 13); the Powers stock Pledge stipulated "laws of the Commonwealth of Massachusetts" (Exhibit E, ¶ 6); the Senior Debenture Pledge stipulated the Massachusetts Uniform Commercial Code (Exhibit G); and the Powers Debenture Pledge (Exhibit H) incorporated all such provisions by reference.

37. M. C. L. A. c. 106, § 1-105; 12A P. S. § 1-105. Al citations hereafter to the U. C. C. section number only, since the Massachusetts statute (and that of Pennsylvania) is numbered similarly. See, also, *Seeman v. Phila. Warehouse Co.*, 274 U. S. 403 (1927).

38. See, also, § 9-102 of the U. C. C., which would by its terms make this transaction governed by Article 9 of the Code, in keeping with the purpose of the Article as found in the comment "to bring all consensual security interests in personal property . . . under this Article. . . ."

> and . . . to any other person who has a security interest in the collateral . . . who is known by the secured party to have a secured interest in the collateral."

and of § 9-507(2):

> "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party *in good faith for the purpose of avoiding or reducing loss and of effective realization* either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . . . A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable." [Emphasis added for Massachusetts amendment to the official text.]

Before reviewing the standards suggested by the U. C. C., it should be made clear that this proceeding is clearly one contemplated by the last sentence of § 9-507(2), which provides for a conclusive determination of commercial reasonableness in a judicial proceeding. The Official Comment, Paragraph 2, points out that in "appropriate cases" it is of "great importance to . . . give the secured

party means of getting, by court order . . . approval of a proposed method of disposition as a commercially reasonable one," in light of the attack made possible by § 9-507(1) against any unapproved dispositions. Thus, it is consonant with the U. C. C. that this sales contract be approved by a declaratory judgment.[39] It should also be noted that the announced opposition of the Sylks to this sale and the underlying insolvency or conservatorship of Penrose make this case particularly "appropriate" for a determination of commercial reasonableness prior to multiple direct attacks by various parties.

Although the words of § 9-504(3) seem to grant the secured parties an absolute option of whether or not to have a public or private sale, it seems unwise to take such words literally. To begin with, the second sentence of § 9-504(3) would at least seem to include within the words "method, manner, time, place and terms" the fundamental choice of public versus private sale, and thus the secured parties must choose between a private or public sale according to which, if either, is the more "commercially reasonable." No particular standards are suggested for measuring this reasonableness, but informative comment may be found in the analogous section in the sales article of the Code, § 2-706, and the above emphasized language in the unique Massachusetts amendment to § 9-507(2) should be considered.

Section 2-706, dealing with a seller's rights and duties to resell, has requirements of commercial reasonableness exactly parallel to those of § 9-504(3), and the Official Comment to § 2-706, paragraph 4, defines "public sales" as "sales by auction," defines "private sale" as including "solicitation and negotiation conducted either directly or through a broker," and states that the option between the two was given to enable "the seller to resell in accordance

39. Cf. the definition of "action;" § 1-207(1).

with reasonable commercial practices so as to realize as high a price as possible in the circumstances."[40] The Massachusetts addition to § 9-507, "in good faith for the purpose of avoiding or reducing loss and of effective realization," arguably also adds further standards to "commercially reasonable manner."[41] And to the extent "manner" includes the choice of private or public sale under § 9-504(3), this additional language is relevant.

The record in this case makes it quite clear that the plaintiffs thoroughly investigated the type of sale that would be most advantageous in terms of maximum sales price. They relied upon expert and thoroughly experienced advice from a large media broker that a private or "negotiated" sale would produce the highest price. They rejected a "semi-private" sale of limited bidding because the potential S. E. C. problems increased the costs and liabilities involved[42] and because of the defect of public auctions:

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40. "4. Subsection (2) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By 'public' sale is meant a sale by auction. A 'private' sale may be effected by solicitation and negotiation conducted either directly or through a broker. In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed." ([§ 2-706, Official Comment].

41. An explanation of reasons for the Massachusetts addition was not readily available to the court. The phrase "in good faith for the purposes of avoiding or reducing loss and of effective realization", however, appears to make explicit the good faith requirement noted in the Comment and to use the language of § 2-704(2) which deals with seller's rights to identify goods to the contract. As added to § 9-507 they seem to express over-caution to prevent any sale of collateral that may be "dumping" or some other sharp or unconscionable practice.

42. This is the "public" offering problem, see, e.g., *United States v. Custer Channel Wing Corp.*, 376 F. 2d 676 (4th Cir. 1967); *S. E. C. v. Guild Films Company, Inc.*, 279 F. 2d 485, (2nd Cir.) cert. den. 364 U. S. 819 (1960).

having a radio station under such public scrutiny tends to depress the station's value. Not only did the defendants fail to overcome these reasons why a private sale was a commercially reasonable manner of sale, but counsel for WPEN, when arguing against an order compelling assistance in the F. C. C. application, explained quite convincingly how such public scrutiny adversely affects a radio station.[43] In addition, the concerted and admitted opposition of the Sylks to any sale they did not favor made extensive negotiations of the terms of any contract of sale crucial. Such could not take place under any system of limited bids involving several potential purchasers.[44]

Under the third sentence of § 9-504(3), the requirement of reasonable notice, there is no question on this record and in light of the several "notice" cases decided under the U. C. C. that the plaintiffs have fulfilled the requirements of this section.[45] Many notices, both formal and informal,

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43. Counsel for Penrose argued strenuously during the hearings under Count I that the knowledge a prospective buyer like Field obtained concerning WPEN contracts could be used against WPEN. A limited bid quasi-public sale would only have increased any such jeopardy to the value of WPEN.

44. It is, of course, unclear under the U. C. C. whether such a limited list of bidders sale would be "public" or "private" and, accordingly, what concomitant duties and rights arise such as notice and the right of the secured party to purchase. These questions, however, need not be decided under our decision in this case.

45. The so-called "notice" cases include *Atlas Credit Corporation v. Dilbow*, 193 Pa. Super. 649, 165 A. 2d 704 (1960) (failure to send out any notice held to be a violation of § 9-504); *Alliance Discount Corp. v. Shaw*, 195 Pa. Super. 601, 171 A. 2d 548 (1961) (private sale set aside for want of notice); *Baber v. Williams Ford Company*, 396 S. W. 2d 302 (Ark. 1965) (question whether notice was reasonable held to be for jury); Also, *Fort Knox National Bank v. Gustafson*, 385 S. W. 2d 196 Ct. App., (Ky. 1964); *Hudspeth Motors, Inc., v. Wilkinson*, 382 S. W. 2d 191 (Ark. 1964) (notification requirement of § 9-504 demands only that the seller take such steps as are reasonably required to inform the person to be notified "whether or not such other person actually comes to know of it" U. C. C.

were given to the defendants from December 1964 to May 26, 1967. The 1964 notice alone would have satisfied the requirement of "reasonable notification of the time after which any private sale . . . is to be made. . . ." Moreover, since the notice cases have stressed the important of § 9-504(3) notice in terms of the debtors' right under § 9-506 to redeem collateral "[a]t any time before the secured party has . . . entered into a contract for its disposition . . .," it is noted that Penrose and Sylks were also asked to redeem the collateral in December 1964, and then given formal notice that they had ten more days from the signing of the Field Contract on May 26, 1967, to still exercise their right of redemption. The plaintiffs have more than carried their burden of showing reasonable notice.

The core of this case concerns the duties imposed by the second sentence of § 9-504(3) and the standards for measuring compliance with the words "commercially reasonable" that are suggested in § 9-507(2). The phrase "commercially reasonable" appears throughout the U. C. C.[46] Although its technical role may vary from section to section, the basic criteria for evaluating "commercially reasonable" would seem to be consistent. Accordingly, some guidance can be found outside Article 9.[47]

1-201(26)). See *Keels v. Universal C. I. T. Credit Corp.*, 222 F. Supp. 696 (W. D. Pa. 1963), aff'd. 335 F. 2d 846 (3rd Cir. 1964). See, also, *Atlas Construction Co. v. Dra??? Doyle*, 114 P. L. J. 34 (C. P. Allegheny Co. 1952); *Third National Bank & Tr. Co. v. Stagnolo*, 25 Mass. App. Dec. 58 (1967).

46. See Mellinkoff, *The Language of the Uniform Commercial Code*, 77 Yale L. J. 185, 209 ff. (1967). E.g., §§ 2-103(1)(6), 2-311(1), 2-402(2), 2-510(3), 2-609(1), 2-610(a), 2-614(1), 2-704(2), 2-706, 2-709(1)(2), 2-710, 2-715(1), 3-406, 3-419(3), 7-210(1), 7-308(1), 7-404, 9-318(2), 9-502(2).

47. This reading of the U. C. C. as a whole is reinforced, for example, by the commentary to § 7-210, "Enforcement of Warehouseman's Lien" which has language virtually identical to § 9-507(2). The comment directs comparison explicitly to the sales provision in § 2-706. Of course, the comment to 9-504 also explicitly states that § 9-504 "follows" the provisions of § 2-706.

In particular, under § 1-205, Comment, Paragraph 6, it is suggested that commercial acceptance makes out a prima facie case that a usage is reasonable and the burden then is on those who attack such usage. The court's role is to prevent "unconscionable or dishonest" practices from becoming standard. Under § 2-706 (which is closely parallel to § 9-504), the lesson of the commentary is that "commercial reasonableness" should not be a "legalistic restriction," although it is the "ultimate test." Such considerations as disposition to "best advantage" and notice varying with "urgency of the matter" suggest a very practical test is needed. But the comment explicitly states that the standard of "in good faith and in a commercially reasonable manner" is intended to be more comprehensive that that of "reasonable care and judgment" that had been established and defined by courts under § 60 of the Uniform Sales Act.[48] This would suggest in the context of the entire U. C. C. that the pragmatic test envisioned must be carefully tempered by the "good faith" requirements of the U. C. C., e.g., §§ 1-201(1a), 1-203.

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48. It is not clear exactly how the Code is supposed to be "more comprehensive" than Sales Act § 60 standards, for example, of "reasonable care and diligence" to secure "the best obtainable price" in a "fair sale . . . according to established business methods," *Obrecht v. Crawford*, 2 A. 2d 1, 8, 175 Md. 385 (1938); "good faith and with reasonable diligence," *C. D. Brown & Co. v. Darling & Co.*, 271 N. Y. S. 407, 408, 241 App. Div. 790 (1934); "reasonable care and judgment in making a resale," *Sheehan v. Braddock Coal Co.*, 293 F. 573, 574 (1st Cir. 1923); "due diligence" to get "highest price" in "best available market," *Atlantic City Tire & Rubber Corp. v. Southwark F. M. Co.*, 137 A. 807, 810, 289 Pa. 569 (1927), or "reasonable care and judgment" as a codification of the common law, *Howse v. Crumb*, 352 P. 2d 285, 289, 143 Colo. 90 (1960). It does appear at least that the "honesty in fact" good faith requirement of § 1-201(19) may be one such U. C. C. addition, (see following discussion) and another may be the suggestion in paragraph 6 of the Comment to § 1-205 that the court has some duty to evaluate a "business usage" or practice even if it is widely practiced or accepted. In a sale that satisfies the U. C. C. requirement of "commercially reasonable," an implicit finding is that Sales Act § 60 standards have been met.

Commentary on Article 9 has convincingly pointed out the "[t]he policy of Article 9 is to provide a simple, efficient, and flexible tool to produce the maximum amount from the disposition of the collateral." To effectuate this, § 9-504 "attempts to chart a path in the narrow area between two policy positions—one a desire to impede dishonest dispositions, and the other, a reluctance to strangle honest transactions with red tape."[49]

The mechanics of this attempt within all of Article 9 are not quite so simply expressed, however. Comment to § 9-504 states that § 9-507(2) provides "some tests as to what is 'commercially reasonable.'" Although § 9-507(2) does not make "good faith" explicitly relevant, the Massachusetts amendment to the text and the Official Comment do. Accordingly, the plaintiffs here must have shown "honesty in fact in the conduct or transaction concerned," § 1-201(19), as well as fulfill the pragmatic tests of commercial reasonablenes. The record in this case makes quite clear that plaintiffs have carried their burden of showing their good faith. Their constant attempts to cooperate with the defendants, particularly those attempts of Powers, preclude the showing of any sharp dealing or "unconscionable and dishonest" practices. The defendants' emphasis on Old Colony's counsel not giving the Sylks a copy of a draft of the Field Contract during April and May of 1967 does not militate to the contrary. Field and his counsel had refused to permit the Sylks to see a draft and their refusal, and even any reluctance by the plaintiffs, was amply justified in the face of the Sylks announced opposition to any sale to Field.

The pragmatic considerations under "commercial reasonableness" must relate to "every aspect of the disposition," § 9-504(3), and presumably the list that follows in

49. *Hogan, The Secured Party and Default Proceedings Under the U. C. C.*, 47 Minn. L. Rev. 205, 219-20 (1962), citing *Gilmore, Article 9 of the Uniform Commercial Code—Part V: Default*, 7 Conf. on Per. Fin. L. Q., 4, 7, 9, (1952).

the second sentence of § 9-504(3)—"method, manner, time, place and terms"—is not exhaustive. The task of analysis, however, is simplified to the extent that the second sentence of § 9-507(2)—"he has sold in a commercially reasonable manner"—offers standards applicable to all aspects of the sale and not just its "manner." Whether this is the proper construction the drafters intended,[50] the Massachusetts amendment to § 9-507, by suggesting additional standards employing the words "loss" and "realization," indicate that the use of "manner" in § 9-507 refers to "every aspect" as phrased in § 9-504(3).[51] The relevant test is thus whether every aspect of the sale is commercially reasonable. It is commercially reasonable if the party (1) acts in good faith, (2) avoids loss, and (3) makes an effective realization. Furthermore, the party may obtain court approval if he (4) sells in the usual manner in a recognized market, or (5) sells at the current price in a recognized market, or (6) sells in conformity with reasonable commercial practices among dealers in the type of property.

Considerations (4) and (5) above are eliminated in this case since it does not appear that there is a "recognized market" for radio stations as this phrase is apparently intended. See, e.g., *Alliance Discount Corp. v. Shaw,* 195 Pa. Super. 601, 171 A. 2d 548 (1961). Consideration (1) of good faith the plaintiff has fulfilled as shown above.

Consideration (6), selling in conformity with, or by employing a dealer (as the Comment suggests) raises the initial problem of defining a "dealer." Not defined in the Code, "dealer" as used in the comment to § 9-507 suggests a person who normally trades in the collateral property as

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50. See, e.g., Hogan, *Bender's Secured Transactions Under the U. C. C.*, § 8.04, p. 879 n. 84 (1967).

51. See footnote 41, *supra.*

his business.[52] The defendants have argued in this case that the plaintiffs violated this section because they did not list WPEN for sale with any established "media brokers."[53] This contention, however, does not deny the commercial reasonableness of the sale for several reasons. First, the brokerage fee would have been approximately $170,000.[54] Avoiding this cost was quite consistent with the duty to avoid or reduce loss. Second, it is not all clear that a media broker is a "dealer" as intended by the U. C. C. WPEN itself was not for sale, but rather the stock of a close corporation owning a radio franchise was the collateral.[55] Such media brokers are only rarely "stock" dealers (even assuming that the broker versus dealer distinction does not require a "dealer" to be someone who first purchases what he sells).[56] Thirdly, it was not shown that plaintiffs lacked their "own facilities for making such [a] sale." They provided considerable exposure of the property to the market, directly,[57] and indirectly through at least two brokers who

52. "One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales." § 9-507, Official Comment.

53. As the comment to § 2-706 states, however, "A 'private' sale may be effected by solicitation and negotiation conducted *either directly* or through a broker." (Emphasis added.)

54. N. T. 264. The defendants, on at least one occasion, objected to the use of a broker (P-38).

55. Apparently a vast majority of radio sales are "asset" deals, not stock sales (N. T. 263).

56. If buying and selling stations is the mark of a dealer, the closest person to being a dealer was Mr. Gregg of LIN Broadcasting Co., the latest prospective purchaser of WPEN. From the little that was testified to concerning LIN's operations, it was clear that the plaintiffs' efforts in finding buyers were similar to Mr. Gregg's methods in buying and selling radio properties.

57. Although the defendants argued that the plaintiffs failed to show the requisite vigor in seeking or dealing with prospective buyers, it appears from the evidence that at least five named potential offers

were approached generally concerning the station. Moreover, Sylk himself testified that he had an offer a month for the station and a list of 35 persons who had expressed interest (N. T. 1756).[58] Finally, this nonconsensual sale of stock was not the type of sale susceptible to much assistance from a broker. The thrashing out of the lack of warranties and representations and the insuring against the virtual certainty of litigation would have had to be done by the parties even if a broker had secured an initially willing purchaser. The plaintiffs here may well have saved the debtors a substantial sum of money.[59]

The remaining explicit standards of commercial reasonableness must be considered in conjunction with the admonition of § 9-507(2) that a better price obtainable at a different time or in a different manner is not of itself sufficient to make a sale not commercially reasonable. In this case,

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so this function of a "dealer," if it is one, was also fulfilled.

were followed up with some diligence. These include "Mid-States Broadcasting" (N. T. 69-71, 787-88); "Crosley Division of Avco" (N. T. 70-74, 788-90, P-32); "Wometco" (N. T. 794); "Wolman" (N. T. 82-83, 796, P-43); and "Stevens" (N. T. 84, P-44) in addition to the offers which became more concrete. Other inquiries were apparently handled by phone and referred to Penrose (N. T. 916-17). Any challenge to the plaintiffs' lack of efforts, however, must be assessed in light of (1) the continuing and extensive efforts of Powers to find a buyer, (2) the defendants Sylk and Penrose's opposition to any sale at all, and (3) the caution that even the defendants admitted must mark any efforts because of the conservatorship (P-87).

58. The plaintiffs did hire a media broker to make an appraisal,

59. Of course, § 9-507 and its comment make clear that the suggested methods are not the exclusive path to commercial reasonableness. More than one commercially reasonable sale was probably possible in this case particularly since the commercial transactions involved are so complex. In addition, it was apparent from all the experts' testimony that "potential" was considered the most important single factor in valuing a radio station (and hence its capital stock). Highly qualified men could probably differ significantly on such an assessment of potential and hence there may well have been a number of "commercially reasonable" prices for the sale of the WPEN stock. It was surprising that the several offers were so close in light of the experts' testimony.

the plaintiffs have introduced extensive evidence that they not only reduced loss and effectively realized on the collateral, but that no higher price was available in May 1967 or before, in a sale of the same method.

As noted above, the choice of a private sale was consonant with the commercially reasonable goal of getting the highest price. But the evaluation of success in obtaining the highest possible price has some limits: initially the one suggested by the first sentence of § 9-507(2) and in this case the limits wilfully imposed by some of the defendants.[60] Although (as the facts outlined above indicate) the several proposed sales involving the cooperation of Penrose, the Sylks, and other junior parties were at cash prices quite close to the Field sale or lower, even if such offers were at a higher price, as a matter of law it would seem against good commercial practice to force a secured party to realize on his collateral only on the debtor's terms.[61] More collateral than that of radio station stock may bring a higher price if the debtor cooperates fully; but if the debtor chooses to oppose the sale, it would be highly "legalistic" to allow him to defeat a sale under Article 9 by evidence of what price was obtainable with his full cooperation. Under a contrary rule, any collateral of a close corporation, for instance, might lose considerable financial utility, a consequence that seems quite opposed to the very goal of the U. C. C. Accordingly, the Field price is commercially

60. The price difference alleged in this case is significantly different from that found sufficient grounds, in light of §§ 9-504 and 9-507 to allow opening of a deficiency judgment in *Family Finance Corp. v. Scott*, 24 Pa. D. & C. 2d 587, 109 Pitts. L. J. 119 (1961). It should be noted that all parties in this case were sophisticated businessmen who entered these transactions realizing that sales of the collateral might be expected.

61. We do not here reach the issue of whether the debtor's opposition violates its duties under the various contracts and pledges with the plaintiffs. There is a substantial chance, however, that extra costs created by its intransigence would be chargeable to it upon suit by the secured parties.

reasonable even if the later Milgram and LIN offers are given a present cash value greater than the Field price. The Field price and the terms of the contract that are unseparable from it are the result of concerted arm's length bargaining and competent legal drafting conducted in a fair and business-like manner.

The other offers are radically different in "method" and sufficiently later in time.[62] The Field sale satisfied §§ 9-504 (3) and 9-507(2) in all aspects; the parties plaintiff have fulfilled the duties required under Article 9 of the U. C. C.[63]

The application of the relevant law of the U. C. C. involving closely intertwined findings of both law and fact, plaintiff's requested Conclusions of Law (Document 77) Nos. 101-104, 201-205, 301, 302, 307, 308, 310, 311, 401 and 405: defendant Penrose's requested Conclusions of Law (Document 79) Nos. 1 and 2; and defendants William H. and Harry S. Sylks' suggested Conclusions of Law (Document 78) Nos. A(2), B(1) and C(1) are GRANTED; the form,

62. Price offers later in time are of diminishing weight at least for the reason that an offer is already "on the table" establishing a known "floor" as to value. In terms of commercial reality in such situations of no recognized "market," if subsequent offers are considered uncritically in determining commercial reasonableness under Article 9, it may well deter parties from stepping forth even with their best aid for such collateral fearing litigation extended by considering later offers of those waiting to see the initial price negotiated.

63. Although the above analysis has been made in terms of the Massachusetts' approach to § 9-504(3) in their addition to § 9-507(2), our conclusion is no different under §§ 9-504 and 9-507 as enacted in Pennsylvania. Only the method of analysis varies: a separate consideration of time, place, terms, etc. Under this approach the discussion of the choice of a private sale would cover "method." "Time" and "place" would appear irrelevant touch stones in this particular sale. "Terms" would have to be separated as a distinct legal category, but as the factual analysis of the Field Contract states above, and as the history of the Field negotiations also show, the conclusion that the "terms" are commercially reasonable would not be changed. The Field contract appears a thoroughly reasonable achievement in arm's length commercial bargaining conducted in the face of many difficult problems.

price, terms, and negotiation of the Field Contract was a commercially reasonable disposition in all aspects, made after reasonable notice, and after an appraisal of the collateral and a financial investigation of the buyer that were equally commercially reasonable in the unique circumstances of this case.

Plaintiffs' and defendants' other requested Conclusions of Law are affirmed only to the extent that they are adopted by the foregoing discussion, conclusions and specific findings. They are denied in all other respects.

In accordance with the discussion with and agreement among all counsel, a final and appealable order will be entered declaring the Field Sale commercially reasonable, and the plaintiffs may submit a proposed order of distribution (including provision for interpleader if desired,) of the proceeds realized by the sale, together with claims for interest and expenses as allowed by § 9-504 and the various pledge agreements. In aid of this order, the additional relief requested under Count I will be granted, ordering the appropriate defendants to cooperate fully in preparing an application to the F. C. C. for transfer of control of WPEN to Martin W. Field.

Although defendants have reserved the right to introduce more evidence and arguments upon submission by the plaintiffs of any proposed order of distribution of funds, the present record indicates that defendant Walter E. Heller & Co. has a lien senior to that of Powers to the extent of interest advanced personally by William Sylk to United as payment of interest on the Senior Notes. Similarly, the present record shows Powers has a valid claim for interest on his notes at 6% from December 1, 1964.

After approval of any proposed order of distribution, the balance of any such sums remaining may be paid into court if desired until a subsequent hearing shall determine,

as to all remaining creditors and the debtor, the order of distribution.

January 25, 1968

FRANCIS L. VAN DUSEN,
Van Dusen, *J.*
Circuit Judge
Sitting by Designation as a
District Court Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted in printing.)

ORDER.

AND Now, January 25, 1968, on consideration of the foregoing finding of fact and conclusions of law and the record, it is expressly determined under F. R. Civ. P. 54(b) that there is no just reason for delay in entering final declaratory judgment on Count II of the Complaint and judgment is entered for plaintiffs and against defendants as follows:

The defendant, Penrose Industries Corporation, being in default under various agreements with the plaintiffs (Exhibits A, C, E and see Document 5), it is adjudged that:

(1) The plaintiff, Old Colony Trust Company, is lawfully entitled to sell the capital stock of William Penn Broadcasting Company as collateral security for the obligations of Penrose Industries Corporation under notes held by plaintiffs, United Ventures, Inc. and Gabriel Powers (Exhibits A and B);

(2) The plaintiffs, United Ventures, Inc. and Gabriel Powers are lawfully entitled to sell a debenture of William Penn Broadcasting Company (issued January 31, 1962, Exhibit F) under the pledge agreements between these plaintiffs and the defendants Sylk (Exhibits G and H); and,

(3) The contract of sale of May 26, 1967 (Exhibit I) between Old Colony Trust Company, United Ventures, Inc.,

and Gabriel Powers (Sellers), and Martin W. Field, buyer, for the sale to the buyer of the above stock and debenture held as collateral by the sellers, is a commercially reasonable disposition of collateral as required by Article 9 of the Uniform Commercial Code, including particularly sections 9-504 and 9-507, and is an otherwise lawful contract of sale.

FRANCIS L. VAN DUSEN,
Van Dusen, *J.*
Circuit Judge
Sitting by Designation as a
District Court Judge